The Ethics of War

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Abstract

Pronouncing an action or course of actions to be prohibited, permitted or obligatory by Just War theory does not thereby establish the moral grounds of that prohibition, permission or obligation; nor does such a pronouncement have sufficient persuasive force to govern actions in the public arena. So what are the moral grounds of laws concerning war, and what ought the laws to be?

I work within a Just War framework, adopting the distinction between *jus ad bellum* and *jus in bello*. From there, I argue that rules governing conduct in war can be morally grounded in a form of rule-consequentialism of negative duties; rules aiming to achieve optimal results regarding the prevention of the violation of certain rights. Rules governing the war decision itself are grounded in self-defence and a duty to rescue; the locus of rightful authority to use force is dependent on institutional design.

Looking towards the public rules, I argue for a new interpretation of some existing law, and in some cases new law. These include recognising rights of encompassing groups to necessary self-defence; recognising a duty to rescue; weapons and tactics that asymmetrically remove risk should be assessed on whether their use violates discrimination; considering *all* persons neither in uniform nor bearing arms as civilians and therefore fully immune from attack, thus ruling out 'targeted' or 'named' killings; considering all persons who bear arms to have combatant rights (POW status, for example).

Throughout, I take it that morally speaking, action-governing public rules (international law, treaties etc) ought not merely to mirror the content of moral principles; we ought to take into account the consequences of the existence of the rules, and of institutional design.

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Author's Declaration

"I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original, except where indicated by special reference in the text, and no part of the dissertation has been submitted for any other academic award. Any views expressed in the dissertation are those of the author.

SIGNED: ..... DATE: 21/9/4 ....."

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1. INTRODUCTION.

This dissertation is in two sections. In the first part I deal with rules concerning conduct in war, grounding public rules in a principle of minimising violations of certain rights. In the second part I deal with rules concerning the war decision itself; the conditions under which it can be permissible to resort to force, and who has the right to do so. For these issues I ground my arguments in principles of self-defence and a duty to rescue.

I should make clear that this is not a historical explanation of the genesis of any bodies of social regulation. It is not intended as a descriptive account of the origins of the laws of war; rather, it is a normative account of how those laws can be justified. It is not an exercise in political science, but a properly moralised view exploring the moral justification of public rules.

In this chapter I first outline the reasoning that led to my approach. After that, the remainder of this chapter considers under what conditions norms concerning war can be taken to be susceptible to the common knowledge and acceptability needed for them to function effectively.

Norms Concerning the War Decision and Conduct in War.

All war is morally worrying. Nonetheless, the changing character of war and the changing nature of the world has given rise to new moral problems; or perhaps has led us to think about old problems with new urgency.[1] In order to re-evaluate norms concerning both conduct in war and the decision to use armed force we

[1] For example Singer points out that war no longer involves large masses of 'citizen soldiers' on a designated battlefield, nor is it exclusively undertaken by nation-states. P. W. Singer, *Wired for War: The Robotics revolution and Conflict in the 21st Century* (New York: Penguin books, 2009), 267. Note also that I am not claiming that the changing character of war is something new - it may well be the case that war has always had a changing character, and so for as long as laws of war have existed there has been a need to review those laws.

need not only a moral analysis of the facts, we also need a clear understanding of what moral reasons can be given to justify the content of 'laws of war'[2] concerning those domains.

Just War theory, or the body of work that can be collectively referred to as the Just War tradition, is a good starting point. The distinctions between, and content of, *jus ad bellum* and *jus in bello* requirements are not just useful analytic tools for orienting and structuring our moral thinking about conflict; they can give practical guidance for the war decision and conduct in war.[3]

My approach is clearly rooted in the Just War tradition; for example, I draw on Just War concepts such as just cause and the principle of discrimination as apt topics for analysis. I also follow the distinction between rules governing the war decision and rules governing conduct in war. However, there is a sense in which from those Just War principles, my arguments 'look in two directions': towards public, action-governing rules, and moral grounds for those rules.

It may be helpful very briefly to set this approach in the context of other writers' work. McMahan is predominantly concerned with the moral justification of acts, judged from the viewpoint of rights of individuals. He argues that the current public rules concerning conduct in war diverge from the morality of war and have pragmatic grounds.[4] My account by contrast is concerned with the moral justification of the public rules. This approach is, in a sense, inspired by Rodin's

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[2] Taken to include rules for both conduct in war (for example, to be found in the Geneva Conventions), and the war decision itself (as in the UN Charter).

[3] See Appendix 1.

[4] For example, in J. McMahan, "The Morality of War and the Law of War," in *Just and Unjust Warriors*, ed. D. Rodin and H. Shue (Oxford: OUP, 2008),19 - 43, and J. McMahan, "The Sources and Status of Just War Principles," *Journal of Military Ethics* 6(2) (2007): esp. p 100. Much of his work on war is in these topics; much of it I can agree with. We diverge on the issue of a moral justification for agreeing a 'pragmatic' set of public rules.

War & Self-Defense [5] in which he examines the claim that the right in international law[6] for states to use armed force to defend against aggression is grounded in a moral right of self-defence. However, I reach different conclusions regarding the moral justifiability of this law (and on the issue of the applicability of consequentialist reasoning to the problems of war).

Like Walzer, my account distinguishes between rules concerning the war decision and those concerning acts in war,[7] and recognises that the justification of different domains of rules might appeal to different grounds. However, in Walzer's work the distinction is not always clear between Just War constraints and requirements, the moral grounds of permissions and prohibitions in war, and the content of enforceable public rules. Finally, we cannot simply move from moral prohibitions and obligations to embodying those prohibitions etc. in law. We have to take into account the institutional frameworks in which the laws will operate, and the consequences of the existence of the law. This aspect of my argument has similarities with Buchanan's work.[8]

Now, the importance of the public rules is twofold. First, Just War principles in their raw form lack determinacy, so we need clear and public action-governing rules for co-ordination purposes. Secondly, pronouncing some action to be prohibited by Just War tradition does not in itself have sufficient 'normative pull' to do the work required – that is, the need to draw universally binding boundaries around resort to force and permissible conduct in war. Of more importance in that respect are the content of public rules concerning conflict; that is laws of war, or international

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[5] D. Rodin, *War and Self-Defense* (Oxford: OUP, 2002).
[6] As embodied for example in UN Article 51, cited in ibid. p 105.
[7] *Jus in bello* and *jus ad bellum.*
[8] For example, A. Buchanan, "Institutionalising the Just War," *Philosophy and Public Affairs* 34(1) (2006): 2-38; and A. Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26(1) (1997): 31-61.

humanitarian law, along with knowledge that violations will lead to punishment. Admittedly those laws are still violated, but they make for a more binding and enforceable guide to action than moral judgments alone.[9]

Looking in the other direction towards the moral grounds of public rules, claiming some action or activity to be permitted (or prohibited) by Just War theory does not in itself establish the moral permissibility (or prohibition) of that action. We need to ground the prohibitions, permissions and obligations embodied in international norms in more fundamental moral principles.

While some writers in the Just War tradition conceive of war as embodying the notion of restraint,[10] too often those engaged in conflict do not see it that way. I have often been faced with the objection that discussion of the laws of war is futile or meaningless because many or most conflicts are conducted without regard for the rules or laws.[11] War, so the objection goes, is essentially not a rule-governed activity.[12] I will call this the 'Futility of Laws' objection.

The Futility of Laws objection can be taken in two ways. First, the objectors believe that laws concerning war are meant to constitute what it is to be engaged in the act of waging war but, so the objection goes, that is a 'mere paper exercise'

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[9] Compare with the moral claim that drivers ought not to park in front of the gates of a primary school. If that norm were not embodied in positive law, drivers could still park in front of the school for self-interested reasons with (legal) impunity. Also, for drivers who wished to abide by this norm, there may be a degree of uncertainty regarding what constituted 'in front of the gates of the school'. Painting double yellow lines to indicate the 'no stopping' zone, along with a system of penalties for drivers who violate, would at least mitigate both problems.

[10] J.T. Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), Chapter 4.

[11] This objection was raised by several students at Lifelong Learning classes for University of Cardiff and University of Bristol. While students on these courses included several former members of the armed forces, the objections came from those with no (stated) experience of war, rather than these former soldiers.

[12] The view that war is not a rule-governed activity contrasts with, for example, Walzer: 'War is distinguishable from murder and massacre only when restrictions are established in the reach of battle.' M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 2002 3rd edn), 42.

because most armed conflicts are not undertaken and conducted within the framework of those laws. Second, the objectors claim that the drawing up of rules that are meant to regulate conduct in war is futile because those rules are regularly violated with impunity.

The first interpretation is a misunderstanding of the purpose of laws of war. Those rules are constitutive in the sense that reference to these can play a role in distinguishing war from other situations of conflict, such as riots. But laws of war are not constitutive,[13] in the sense that if war is conducted outside those laws it does not thereby cease to be war and become some other activity.[14] While unrestricted massacre is not in itself war, if during a condition of war one of the belligerent parties engages in unrestricted massacre it does not thereby cease to be a condition of war; nor do we judge it as something occurring in addition to war. It is a crime in war.[15]

On the second interpretation, the Futility of Laws objection misses the point of rules regulating harmful activities. The Just War separation of constraints into two aspects emphasises two different functions of rules concerning war. First, we have rules giving conditions under which it is permissible to resort to force. Beginning with the assumption that using armed force is generally prohibited, we then set out

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[13] '[T]he role of law in war is not to constitute 'the rules of the game', but rather to provide a modest body of rules applicable to certain aspects and consequences of war.' A. Roberts, "The Principle of Equal Application of the Laws of War," in *Just and Unjust Warriors,* eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 228.

[14] It might be useful to compare this with the activity of 'driving a car'. Positive law contains many road-traffic regulations drawing boundaries around what is permissible when driving on the public highway. But if a driver were to violate many of these regulations, they would still be engaged in the activity of driving a car; we do not say they thereby are no longer driving a car and are engaged in some other activity.

[15] Hence I disagree with Johnson who says that '... such present-day conflicts as those in Bosnia and Rwanda-Zaire do not represent an expression of the inherent nature of war, but a violation of the fundamental principles that define war'. Johnson, op. cit. p 123. While it is true that unrestricted massacre does not itself constitute a condition of war, war does contain events of unrestricted massacre (and does not cease to be war just because those acts violate the rules). Such acts may count as war crimes or, if widespread and systematic, crimes against humanity.

the necessary conditions that must be met for waging war to be permissible. Given that all wars are destructive, these rules are an attempt to prevent us from getting into a state of war.

But - according to this response - recognising that war happens despite these regulations, we ought at least to make some attempt to contain or limit the harms when it does occur.[16] Hence the need for rules prescribing conduct in war, such as a prohibition on targeting noncombatants. While the first domain of rules aims to prevent us getting into a bad situation - war - the latter is an attempt to mitigate the harms once we get into that bad situation.[17] From the fact that those rules are violated it does not follow that we should give up any attempt to regulate resort to and conduct in war.

In a hypothetical account, it may be tempting to argue that the laws constituting the 'laws of war' - concerning conduct in war and the war decision - can be morally grounded in some basic principle such as, for example, the principle of self-defence. That is, some fundamental principle can morally justify the body of public rules - prohibitions, permissions and requirements - and can be appealed to when creating new rules, and when revising existing rules. However, in the real world, it is likely that any existing body of laws relating to a given field of activity – such as war - will be a 'hotch-potch' of regulations that have developed over time. In the

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[16] As Shue puts it, 'unless we can eliminate war, we need dedicated rules for war to protect what we can even during war'. H. Shue, "Do We Need a 'Morality of War?" in *Just and Unjust Warriors*, eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 96.

[17] So I do not agree that laws of war exist for the purpose of 'evening-up the odds' to make an even fight, nor are they about creating conditions of fairness. (On the last point, see for example D. Rodin, "The Ethics of Asymmetric War," *The Ethics of War*, eds. R. Sorabji and D. Rodin (Aldershot: Ashgate Publishing, 2006).) Also, the idea that motivates Killmister's arguments regarding *jus in bello* constraints and remote weaponry – that 'the political landscape must not be determined by brute force' – is puzzling in that the use of brute force in order to determine the political landscape seems a good definition of what war is (S. Killmister, "Remote Weaponry: The Ethical Implications," *Journal of Applied Philosophy* 25(2) (2008): 123). Killmister's comment would be better directed at *jus ad bellum* requirements, limiting the conditions in which it may be permissible to resort to force.

following I will outline[18] why moral reasoning that can ground rules concerning armed conflict will call on in a diversity of principles and interests.

Regarding the rules of conduct in war, such as the equal status of combatants on both sides of the conflict regardless of whether their cause is just, it might seem that a moral justification of those rules could be an appeal to a harm minimisation principle, meaning that these rules minimise the harms caused in war. But that is not right, as this would require rules, say, to provide needy enemy civilians with food parcels etc; and there is no such requirement in public rules of conduct in war.[19] So a better moral justification is that they are rules that – attempt to – minimise violations of certain rights, such as targeting noncombatants, torture, rape, etc. I will refer to this as a rule-consequentialist justification of the laws, but by this I am not making any claims regarding the connection of the meaning of 'rightness' to following rules. Rather, I am arguing that concerning conduct in war, optimal principles of social regulation – sets of rules for public life – are those that minimise violations of certain rights. Looking at this from the viewpoint of duties, the idea of the rules is to maximise compliance with duties not to do certain things to other persons. This could be characterised as a consequentialism of negative duties.[20]

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[18] For the purpose of giving an overview of the dissertation. The arguments will be presented in full in the relevant chapters.

[19] UN Resolution 1674 does require positive measures to reduce harms to civilians regardless of nationality; for example, the facilitation of the provision for humanitarian assistance and the creation of conditions conducive to the safe return of displaced persons. But these measures are requirements on UN peacekeeping or peacebuilding operations (paragraph 16) or as part of peace processes or post-conflict recovery (paragraph 11). UN Security Council Resolution 1674 (2006), http://daccessdds.un.org/doc/UNDOC/GEN/N06/331/99/PDF/N0633199.pdf?OpenElement, (accessed 31/10/09). Of course we can ask if rules concerning conduct in war ought to include such an obligation; the process of presenting a moral justification of rules will involve arguments for the existing body of laws, and then turning attention back on those laws to improve them in the light of the proposed justification.

[20] While he does not claim this as the justification of the laws, McMahan agrees that the effect of laws governing conduct in conflict ought to be to 'mitigate and contain the destructive effects of war rather than exacerbate them'. J. McMahan, "The Morality of War and the Law of War," In *Just and Unjust Warriors,* eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 34.

This rule-consequentialist justification cannot be used to support the laws concerning resort to force, the war decision. Those norms permit use of defensive force against a threat of sufficient gravity. Crucially, this does not mean that the threat, if left unresisted, would have to outweigh harms caused if defensive were used; it just has to be sufficiently weighty to warrant the latter. Therefore a state's response when justifiably acting in accord with this law could result in an increase in rights violations. Moreover, that could be the case in many or all legitimate uses of defensive force. Hence the norms concerning resort to force could not be justified by appeal to my rule-consequentialist account.

I will argue that against a background prohibition on waging war, a rule permitting a community to resort to armed force when they are the target of aggression can be grounded in the rights of individuals to engage in acts of self-defence.

We could then enquire if this appeal to a right of self-defence could serve as moral grounds for all laws concerning war. If we were to judge conduct in war on the self-defence model, volunteer soldiers willingly partaking in an unprovoked attack would be held culpable for the harms they caused. But in public rules, and in the Just War tradition, that is not the case. Provided they do not violate other rules of conduct in war, all combatants use armed force with legal impunity. So the principle of self-defence cannot on its own support established rules governing conduct in war.[21]

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[21] McMahan, for example, argues that the symmetry of soldiers in the public rules does not reflect the moral asymmetry generated by considerations of culpability and rights to defence. J. McMahan, *Killing in War* (Oxford: Clarendon Press, 2009). Emerton and Handfield, on the other hand, draw on a notion of self-defence in a situation of 'Affray' to ground *jus in bello* in self-defence. I disagree with their analysis; specifically the claim that if someone engages in a barroom brawl and by so doing endangers a third party, they can be non-culpable for (or with respect to) this unjustified threat to that third party. P. Emerton, and T. Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy and Public Affairs* 37(4) (2009): 386.

I also argue that a permission, and obligation, to use armed force in the assistance of another community can be grounded in a duty to rescue. Finally, I argue for the permissibility of preventive war; this permission however is constrained by arguments concerning the rightful authority to undertake use of armed force.

It is, then, not the case that the moral justification of the body of rules concerning war will appeal to some single principle. I will use the term 'pluralism' to refer to the view that any moral justification of the body of public rules – the rules of social regulation – that constitute the international laws concerning conflict would have to appeal to a variety of moral principles.[22]

It is possible that these different principles will recommend rules that clash. That is, the appeal to several moral principles could lead to moral dilemmas; according to one principle, you ought to X, while according to another you ought to not X; or you ought to X, and you ought to Y, when it is not possible to both X and Y. For example, political leaders may have an obligation to ensure the security of citizens of their own state against unjust aggression, but may also have an obligation to refrain from ordering their military to commit crimes in war, such as attacking civilian targets. There could however arise occasions when the only way the leaders could fulfil the first obligation would be by violating the second. In this case, obligations concerning defence against unjust aggression are conflicting with rules prohibiting violations of certain rights. This is contrary to the agglomeration

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[22] Steinhoff also endorses pluralism with respect to morality and war. He says that moral guilt, convention, self-defence, and justifying emergency theories are all relevant when considering who is a legitimate target (p 56). Like me, he says that these principles have to be weighed against each other, using judgment (p. 58). Unlike me, he weighs principles to judge the act rather than the content of the public rule (p 58). U. Steinhoff , "Civilians and Soldiers," in *Civilian Immunity in War*, ed. I. Primoratz, (OUP: Oxford, 2007). McMahan points out that the idea that laws concerning conflict draw on more than one set of principles, from different sources,'can be found at least as early as Grotius'. McMahan 2008, 34. Orend expresses the view that Just War theory is best understood as a blending of deontology (e.g. respect for human rights) and consequentialism ('results based appeals to satisfying outcomes'). While my pluralism concerns the justification of public rules, his concerns an analysis of *jus ad bellum* requirements. B. Orend, "The Rules of War," *Ethics and International Affairs* 21(4) (2007): 473.

principle,[23] and the principle that ought implies can. These are *pro tanto* reasons to reject pluralism[24] and seek justification for the rules in either monism or some form of constructivism.

Conflict resolution between competing and incompatible rules could be achieved by giving 'ultimate pride of place'[25] to one of the concepts as overriding or fundamental - to be the one that takes precedence if there is conflict within the variety of principles that ground the laws. If this were the right solution for choosing between incompatible rules, then while my account so far seems to ground the rules in a variety of fundamental rights and duties, when we come to resolving clashes, we would find that either some right or some duty has ultimate 'pride of place' in the theory.[26] This could be one of those in the variety of grounding principles, or on the other hand it may be some 'meta-principle'.

However, if the arguments presented above are correct, then the claim that we can ultimately appeal to just one fundamental principle must be wrong. Diverse regulations such as use of certain weapons on the battlefield, duties to assist shipwrecked sailors, and conditions for just resort to force all have different grounds; there is no single fundamental principle that justifies all of these. Neither a principle of minimising certain rights violations, nor a principle of self-defence, nor a duty to rescue, can be the ultimate principle guiding all regulations with regard to laws concerning war. So the structure of my proposed justification of the laws must be that there is an 'irreducible family of first principles'[27] that are appealed to as the moral grounds of those laws.

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[23] If you ought to X and you ought to Y, you ought to X and Y.
[24] The objection could be that the view I have presented is either not workable in practice, or is logically incoherent.
[25] R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 171.
[26] Ibid. p 171.
[27] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999 revised edition), 30.

So the problem remains that in order to arrive at the final body of rules there will inevitably be a need to decide between incompatible rules. Insofar as the deontological and consequentialist elements dominate thought in different areas of application (the war decision and conduct in war respectively), perhaps the scope for such dilemmas is reduced. But even so, Williams[28] argues that the existence of a real dilemma is not the end of all moral inquiry. When we (morally) ought to do X and (morally) ought to do Y but cannot do both X and Y, it still makes sense to further inquire into what we (deliberatively) ought to do.[29] When considering new rules, if these principles recommend conflicting rules, those principles will just 'have to be weighed against each other'.[30] For complex human activities such as war, my pluralism captures 'the real texture of our ethical lives'.[31]

Overlapping Consensus.

The variety of prohibitions, permissions and requirements embodied in the laws concerning war[32] also need to be norms that diverse political communities support or ought to support (I will say more about that 'ought' claim below). This is because if the International Laws of War are to be 'reasonable global norms and standards to which different political societies can be held accountable',[33] then support for those norms cannot be dependent on balance of power or the interests

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[28] B.A.O. Williams and W.F. Atkinson, "Ethical Consistency," *Proceedings of the Aristotelian Society, Supplementary Volumes* 39 (1965): 103 – 138.

[29] Insofar as dilemmas are possible, Williams (ibid.) argues that this leads us to reject either the agglomeration principle or 'ought implies can'. He accepts 'ought implies can' so consequently rejects the principle of agglomeration. So while pluralism can lead to dilemmas that are contrary to axioms of deontic logic, that could be a reason for rejecting pluralism, but it could also be resolved by revising those axioms. (Atkinson argues that we could equally reject 'ought implies can', but that would be inconsistent with my arguments for rule consequentialism.)

[30] Rawls op. cit.

[31] D.M. Weinstock, "Moral pluralism," in E. Craig (Ed.), *Routledge Encyclopedia of Philosophy*, (London: Routledge. 1998), http://www.rep.routledge.com/article/L058SECT2, (accessed June 28, 2009).

[32] That is, laws concerning the war decision, and laws concerning conduct in war.

[33] J. Cohen, "Minimalism About Human Rights: The Most We Can Hope For," *The Journal of Political Philosophy* 12(2) (2004): 200.

of individual (dominant) communities. In the former case, the balance of power between, and interests of, different political societies can change; in the latter case, ensuring compliance with the law would rely on coercion - threat of or use of force.[34] And given that among those diverse political communities there will be different moral, religious and philosophical traditions, those laws need to be norms that diverse traditions can support.

We can draw an analogy with domestic law. There are two considerations: moral, and pragmatic. The moral issue concerns legitimacy – arguing from a liberal point of view, employing the coercive force of the state against the citizens to enforce compliance with the law would be considered illegitimate if the justification of those laws could not be accepted by all reasonable citizens. The pragmatic issue is the requirement for some common knowledge on what is to be permitted and prohibited. A 'shared public basis for the justification'[35] of those laws could satisfy that need.

Regarding the International Laws of War, the moral concern would arise if there were some legal body with coercive power that enforced compliance (or punished non-compliance) with laws the justification of which could not be accepted by all reasonable traditions. However, that moral concern presupposes a more fundamental moral worry; that is whether there is such a legal body with coercive power, and whether peoples over whom power is exercised recognise universal obligations to that body as a legitimate authority.[36] The distinction between the domestic and the international is highlighted by the status of, for example, the

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[34] Also, laws need to be clear, and 'not subject to frequent or arbitrary change' A. Buchanan, "From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform," *Ethics* 111(4). (2001): 683.

[35] J. Rawls, "The Idea of an Overlapping Consensus," in *John Rawls: Collected Papers*, Ed. Samuel Freeman (Cambridge Massachusetts: Harvard University Press, 1999), 421.

[36] I will address the issue of legitimacy in Chapter 9.

Additional Protocols to the Geneva Conventions as treaties which some states have ratified (and so can be called to account), and some have not.

For international law the pragmatic issue is the same as that for the domestic analogy; the need for common knowledge concerning the law. That could be satisfied by a shared public basis for the justification of the laws, meaning sharing a justification. Or it could be satisfied by a weaker condition, agreeing that those laws are justified.[37] Sharing a justification does not require sharing the same moral or philosophical tradition; it would require the less rigorous demand that the moral basis of the public rules - a right to self-defence for example - could be supported by those different traditions, for their own reasons.

I ought (again) to make a distinction clear here. I am not presenting here a descriptive account of the genesis of the laws of war and how different moral traditions influenced the actual formation of the law (or if they did at all). Rather, my concern is with the nature of the relationship that ought to hold between the diverse moral / religious communities of different political communities and the variety of principles that I am claiming can give moral grounds for the 'laws of war'. My argument here will make prescriptive claims about this relationship, regarding the conditions that ought to obtain if international laws grounded in that variety of principles are to be asserted as 'reasonable global norms'.

Above, I claimed that it ought to be the case that laws of war embody norms that are supported (or ought to be supported) by the different moral, religious and philosophical traditions of the states that are to be held accountable to them. Then

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[37] The former I will later refer to as an overlapping consensus on the laws, the latter a convergence on the laws. There is an overlapping consensus on the laws when there is a convergence on the principles underpinning those laws.

I suggested that this support could take the form of convergence on the basis of justification of those laws. Rawls' 'overlapping consensus' appears to have similarities with the problem I address, so is worth exploring.

Rawls' Overlapping Consensus.

In this section I will outline Rawls on the 'overlapping consensus' for the domestic case, and then show how this can be applied to the international case. First, the problem that the overlapping consensus (OC) is meant to address: Rawls is concerned with a political conception of justice. In a modern liberal society, people hold a range of 'comprehensive doctrines'. Given that fact, a political conception of justice cannot be grounded in one comprehensive doctrine if support for the conception and political institutions grounded in it is to have stability. There are two aspects of the concern for stability. First is a practical consideration; it would be futile to build a political structure on a conception that failed to be stable. Second, stability requires a particular kind of support; that occurs when those who grow up under the institutions in question 'acquire a reasoned and informed allegiance'[38] to them, to render those institutions stable. To address this problem, Rawls introduces the idea of the overlapping consensus.

For Rawls the political conception of justice is presented as a 'free standing' view – it is formulated independently of non-political values.[39] The conception of justice 'is not presented as an application of an already elaborated moral doctrine'.[40] It is formulated specifically for political relationships. Rawls says that the content arises not from within people's comprehensive doctrines, but 'from the various fundamental ideas drawn from the public political culture of a democratic

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[38] J. Rawls, "The Domain of the Political and Overlapping Consensus," in *John Rawls: Collected Papers*, ed. Samuel Freeman (Cambridge Massachusetts: Harvard University Press, 1999), 487.
[39] Ibid. pp 482 – 483.
[40] Ibid. p 482.

society'.[41] Since constitutional elements are grounded in those political values alone, it is thus a 'free standing' account of the values as those of a special domain.[42]

It is up to individuals (or groups) in society to relate these values to the rest of their comprehensive doctrine. For individuals the political conception of justice may be an adjunct to their comprehensive doctrine, or be fully derivable from it – this is up to individuals and their views.[43] Thus citizens hold two views; one is (or coincides with) a political conception of justice, the other is the comprehensive doctrine to which that conception is related.[44]

In so far as the comprehensive doctrines can endorse the political conception, that conception and the institutions it supports 'can gain the support of an overlapping consensus'.[45] Rawls makes the further claim that these values will normally have sufficient value to outweigh any values that conflict. The important issues are settled by reference to the political conception, not the comprehensive doctrines.[46]

Hence for Rawls the political conception of justice is presented in two stages; first the freestanding political conception, then with the introduction of the overlapping consensus, the claim that diverse comprehensive doctrines can endorse that conception.

Note that this does not mean that unity relies on mere agreement of interests, nor is the overlapping consensus a mere *modus vivendi*. The latter is a consensus

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[41] Rawls 2001, op.cit. p 32. (See Rawls 1989 p 484 for those values expressed by the principles of justice in Rawls' conception.)
[42] Rawls "The Domain of the Political and Overlapping Consensus," p 486.
[43] Ibid. p 489.
[44] Ibid. p 489 & Rawls 2001 p172
[45] Rawls "The Domain of the Political and Overlapping Consensus," p 483.
[46] Ibid. p 483.

founded on group interests.[47] As the group interests change, and more importantly as the dynamics (balance of power) between groups change, so may the agreement become unstable. By contrast, since the overlapping consensus (for individuals endorsing it) is grounded in each comprehensive doctrine, it has for each group a moral (not mere contingent/pragmatic) justification and so stability. It does not depend on balance of power. So unlike the pragmatic nature of a *modus vivendi*, the overlapping consensus is a moral conception both on the content, and on the grounds that each adherent to a comprehensive doctrine will find in their own tradition.

The political conception of justice does not specify a workable compromise between interests, nor does it look at comprehensive doctrines and then tailor its content to gain allegiance.[48] Rather, there is the possibility of overlapping consensus on the conception, meaning a public recognition and an agreement on its priority.

Rawls considers the objection that the avoidance of a general and comprehensive doctrine implies indifference or scepticism regarding the truth of a political conception of justice.[49] Only by being indifferent or sceptical, so the objection goes, can long-standing controversies be avoided, and this would defeat the aim of achieving an overlapping consensus because it would put political philosophy in conflict with comprehensive doctrines. This is because persons will believe the conception of justice to be true, from the viewpoint of those doctrines.

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[47] Rawls "The Idea of an Overlapping Consensus," p 432.
[48] Rawls "The Domain of the Political and Overlapping Consensus," p 491.
[49] Rawls "The Idea of an Overlapping Consensus," pp 434-5.

Rawls responds that his political conception of justice is neither indifferent nor sceptical regarding moral truth - rather, it is tolerant. There is a narrow range of values[50] at the focus of the overlapping consensus, and we can draw on these to solve a wide range of problems. This does not mean that the idea of the overlapping consensus implies indifference to comprehensive doctrines; it just removes some questions from the political agenda (not denying the importance of those questions for individuals/groups), and controversial questions will not be removed merely in virtue of their being controversial.[51]

An overlapping consensus on a political conception of justice could be practically possible where groups agree on a political conception for pragmatic reasons, and later come to realise the public good of the conception and become prepared to revise the content of their doctrines when in conflict with the political conception (rather than reject the latter[52]). Basic rights and securities are secured and then given due priority.[53]

Gaus[54] points out that Rawls' overlapping consensus involves both consensus and what Gaus calls convergence. There is a consensus on endorsing belief X when we share a reason Y for accepting that belief; everyone accepts belief X for the same reason Y. There is convergence on belief of Y when everyone has different reasons for endorsing Y, but nonetheless they have some reason.

We can now apply this distinction to the international case. According to Rawls, when considering international relations between political communities the parallel of the pluralism of comprehensive doctrines discussed so far is the diversity

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[50] '[F]undamental intuitive ideas we seem to share through the public political culture.' Ibid. p 435.
[51] Ibid.
[52] Ibid. p 441.
[53] Rawls "The Domain of the Political and Overlapping Consensus," p 494.
[54] G. Gaus, *Contemporary Theories of Liberalism* (London: Sage Publications, 2003), 190 – 191.

among peoples – different cultures and different traditions of religious and non-religious thought. Stability will require the conception of justice to be affirmed by an overlapping consensus of these religious, philosophical and moral traditions.[55]

Wenar explains why for Rawls the parties to the global original position should represent peoples and not individuals.[56] In a modern liberal society, people hold a range of 'comprehensive doctrines'. The basic structure will only be legitimate if acceptable to all reasonable citizens. The 'public political culture' is the source of ideas that can be this focal point. The key ideas here are fairness, freedom and equality. Even with a plurality of comprehensive doctrines, there can be a convergence on these ideas.[57] At the global level, there is a wide range of comprehensive political doctrines. The existing global public political culture is the only source of ideas that can serve as a focus. But this is primarily international rather than interpersonal in character – it is peoples not individuals that are free and equal. It is these ideas (freedom and equality of peoples that should relate to each other fairly) that are the focus of convergence. These ideas can produce principles of international justice on which there is an overlapping consensus.[58] The convergence first produces consensus on principles such as national-defence, which is in accord with our firm convictions. Then, having established the worthiness of principles derived in such a way, he can show that there can be an overlapping consensus on issues where our convictions are less secure, such as overseas aid.[59]

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[55] Rawls 2001, p 11 & p 16.
[56] L. Wenar, "Why Rawls is Not a Cosmopolitan Egalitarian," in *Rawls's Law of Peoples: A Realistic Utopia*, ed. R. Martin and D. Reidy (Oxford: Blackwell Publishing, 2006), 95 - 113.
[57] Ibid. pp 101-102.
[58] Ibid. pp102-103.
[59] Ibid. p 107.

Joshua Cohen and Human Rights.

Rawls is interested in consensus on a political conception of justice. However, we can expand the idea of the overlapping consensus. According to Cohen, an autonomous presentation of a conception of rights[60] – an account of rights as an independent normative exercise[61] – can find support from a range of traditions. As long as adherents of each tradition can agree on those rights (and duties), 'each may have his or her own reasons for coming to that agreement'.[62]

If diverse traditions can affirm these basic rights and duties, then that fact could give stability to principles of social regulation – rules for public life – that are grounded in those rights. Support for the rules would not be a mere *modus vivendi* and as such dependent on the balance of power and interests; rather, the rules would be affirmed in an overlapping consensus.

Cohen argues for an autonomous account of rights that can be supported from diverse religious traditions. He calls this approach justificatory minimalism. He distinguishes this from substantive minimalism, which is the view that human rights are concerned only with the protection of negative liberties.[63] Justificatory minimalism makes no such commitment. He also distinguishes his approach from sceptical claims about the grounds of rights – he does not dismiss traditional justifications of rights, he simply does not take any position on foundationalist views. Finally, he says that his view is not an empirical interpretation of justificatory minimalism; that is, he is not arguing that we search among the different traditions to find *de facto* points of overlap. Rather, the conception of rights is presented as

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[60] Op. cit. p 201.
[61] Ibid. p 210.
[62] Rawls 2001 p 151n.
[63] Op. cit. p 192.

an independent normative exercise, so that it is capable of winning support from a wide range of traditions.[64]

Cohen illustrates his idea with two case studies. First he argues that:

> 'the terrain of argument of a global public reason that comprises a conception of human rights seems to be available from within Confucianism... I do not say that we can 'find' a conception of human rights in this ethical tradition. Instead, there are ways of elaborating an ethical outlook that is nonliberal in its conception of the person and political society, but that is also consistent with a reasonable conception of standards to which societies can reasonably be held'.[65]

Then he argues that an interpretation of Islam can also support a conception of human rights.

There is at least one serious shortcoming in Cohen's approach. With regard to Confucianism and Islam, he says that 'In neither case do I aim to show that the best interpretation of either outlook leads to an endorsement of human rights'.[66] 'Instead the aim is to show that the terrain of deliberation about the nature and content of human rights can be occupied by a proponent of these doctrines'.[67] '[A]s my examples should make clear, the autonomously presented conception is not simply *consistent with* those outlooks, but is supported by certain interpretations of them'.[68]

The problem is with the claim that a conception of rights *seems* to be available, and that the proponent of the view *can* agree on rights, from *certain* but not necessarily the *best* interpretations of these traditions. This just is not strong

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[64] Ibid. p 213.
[65] Ibid. p 207.
[66] Ibid. p 202.
[67] Ibid. p 203.
[68] Ibid. p 210, emphasis in original.

enough support for rights that are presented as 'reasonable global norms and standards to which different political societies can be held accountable'.[69]

I have said that Rawls claims that stability cannot be achieved when compliance with principles is achieved merely by use of force. If Rawls' arguments apply to my problem of the laws of war, then the content of the variety of moral grounds underpinning international law of war need to be principles that are supported[70] (on a more or less consensual basis) by prevalent or dominant (non-peripheral) interpretations of the traditions to whom those laws are to apply.

Overlapping Consensus and Laws of War.

So we can now draw these ideas together with respect to the laws of war. I identified above that, for the domestic case, a shared public basis of the justification of laws[71] could satisfy the requirements of legitimacy and common knowledge on the content of the law. For relations between political communities, I claimed that the pressure for consensus comes primarily from the latter.

Rawls' arguments in the domestic case concern the need for 'a shared public basis for the justification of political and social institutions', and the need for 'stability from one generation to the next'.[72] Here, Rawls is referring to a constitutional democracy. For a 'Society of Peoples', the parallel condition of this domestic social unity is a 'unity of a reasonable Society of Peoples'.[73]

The justification of public rules I present here is for rules that are meant to hold in the current (or foreseeable future) messy international climate, not in the

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[69] Ibid. p 200.
[70] Or ought to be supported.
[71] Which would be achieved by convergence on the principles underpinning those laws.
[72] Rawls "The Idea of an Overlapping Consensus," p 421.
[73] Rawls 2001, p 19.

hypothetical unity of some 'reasonable Society of Peoples'; my account assumes non-ideal conditions.[74] Nonetheless, a convergence on the variety of principles underpinning the International Laws of War would meet the need for a common conception and knowledge of the law (a Rawlsian overlapping consensus) by providing a shared basis for the justification of those laws.

Recalling Gaus' distinction above, there would need to be consensus on the public rules embodied in the international humanitarian law if those laws are to be 'reasonable global norms and standards to which different political societies can be held accountable'. This is because simply agreeing on the content of that law (that is, mere convergence on the laws) would not give the stability needed for that body of law. Consensus, the publicly shared basis of justification of those laws, would give the necessary common ground for stability, coordination, efficiency.[75] In changing circumstances requiring a new interpretation or application of the existing laws, or new laws, the shared agreement on the principles underlying the law would make agreement across cultures and generations more likely.

This means that there needs to be convergence on the variety of principles underpinning the law. Convergence would mean that peoples of different communities with different philosophical, moral or religious traditions support each of those principles for their own reasons. Those principles include: a principle of self-defence, a concern for minimising violations of certain rights, and a duty to

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[74] So I think that, for example, Allhoff gets it wrong when after admitting some difficulties that would arise if his ideas were applied in practice, he says that "this really is meant to be a theoretical project, and, I think, we need to work out our theoretical commitments before turning to practice". F. Allhoff, "The War on Terror and the Ethics of Exceptionalism" *Journal of Military Ethics* 8(4) (2009): 280. The working out of theoretical commitments must take account of where they are to be applied.

[75] J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999 revised edition), 5.

rescue. But we do not need to demand consensus[76] on these principles – it is enough that traditions support these principles for their own reasons. Once the basis for consensus on the international humanitarian law has been laid out, we can do more than ask if the current expressions of the different traditions agree on support of these laws. We can also ask if (current, non-peripheral expressions of) those traditions ought to support these laws. If the answer to that is affirmative, then those laws can be included in the body of rules (and perhaps adherents of the traditions in question will modify their views to support those rules).

Furthermore, by comparison with looking for mere *de facto* agreement on rules, this approach would allow for a 'two-way' relationship between the content of the public body of law, and principles supported by the different traditions. By this I mean that we not only look for principles that can ground the public rules; once we establish agreement on those principles, we can turn attention back to public rules and argue for the content of those rules, based on those principles.

It is possible that the different principles that are the moral grounds of the laws of war will recommend rules that clash. In order for there to be support for the rules, agreement on the variety of justifying principles is not sufficient; we need support for (or the capability of support for) the decisions that are made between incompatible rules recommended by those principles.

That appears to be a demanding condition, given my claim that the irreducible first principles have to be weighed against each other. However, we do not have to (implausibly) claim that, when trying to formulate some public rule, all the traditions would weigh all the principles and independently reach the same conclusion. That

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[76] Meaning that it is not necessary for different traditions to support these principles for the same reason. It is sufficient that different traditions converge on these principles.

weighing of principles could take place as a public process of debate in an international forum. The consensus requirement would then require that traditions could support the rules worked out in this process of public discussion.

Given that we are assuming non-ideal conditions, we have to acknowledge that there will be instances of lack of agreement. That is, when it is not the case that all states (nations, peoples, political communities) support or ought to support the content of (what is supposed/proposed to be) the variety of principles that, according to the proposed account, underpin the laws in question.[77]

The problem arises when one tradition could not support those justifying principles. More accurately, the problem arises when from the viewpoint of a non-peripheral interpretation of that tradition it would not be the case that it ought to support them; I will refer to this by the shorter 'could not support them'. One reason why this could be so would be if those principles were simply incompatible with some central aspect of the tradition.

An example of moral disagreement could be, for example, the interpretation of the right of defence against aggression. Some may interpret the right of self-defence as just that; a right to defend oneself. Others may interpret the right of defending against aggression to encompass a right to defend others. In terms of public policy, this could make the difference between prohibition and permission on using armed force for the purposes of humanitarian intervention.

[77] There is another sense in which my account concerns non-ideal conditions. That is, the need for regulations governing conflict arises from the fact of war, which in turn arises from at least one belligerent party doing something they ought not to do (instigating aggression, for example).

Where there would not be or could not be support from moral / religious / philosophical traditions, we ought to make the following distinction. (i) It may be that a tradition that is otherwise considered a reasonable tradition would not or could not support the principles in question. (ii) Alternatively, it may be that a tradition that would not or could not support the principles is one that is not considered a reasonable tradition.

If (i) were the case, and given that we are looking for 'reasonable global norms and standards to which different political societies can be held accountable', this would be a reason to think that those principles cannot be held to be the grounds of international law meant to apply to all communities. Putting that the other way around, if international law is to apply to all communities and is to have the possibility of achieving stability, the principles underpinning those laws must be supported, or it must be the case that they can be supported, by all reasonable traditions. So for my account of the moral justification of the laws of war to stand up, it would have to be the case that a principle of self-defence, a concern for minimising violations of certain rights, and a duty to assist can be supported by all reasonable traditions.[78]

On the other hand, as stated above, it may be that a tradition that does not support the principles is one that is not considered a reasonable tradition. However, that does not necessarily lead us to reject those principles as ones that can underpin laws meant to apply to all communities. Putting that the other way around, if we claim that laws grounded in a cluster of principles can justifiably be applied to all communities, it does not need to be the case that all traditions do or can support those principles.

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[78] Wenar (op. cit. p 27) claims that 'statist principles such as *jus ad bellum* and *jus in bello* are by far the most highly developed normative doctrines we have for the regulation of global affairs'.

But that now runs contrary to the need for a publicly shared basis for the justification of rules. So we now need some explanation of why that condition can be compromised or sacrificed, rather than working on the content of the justifying principles to achieve an overlapping consensus. The answer has to be a question of the need for a balance between the consensus requirement, and not allowing political leaders holding extreme and unacceptable views to hold negotiations to ransom.

In conclusion, if Rawls' ideas regarding overlapping consensus are correct, then the mere fact that the public rules governing conflict can be derived from some fundamental moral principles is not sufficient for those principles to stand as morally justification of the rules. For those rules to stand as global norms to which all can be held accountable, there ought to be the capability of convergence on those grounding principles among non-peripheral interpretations of reasonable traditions.

In Appendix 2 I present a case study showing that there is such a convergence and consensus regarding the prohibitions on violations of certain rights that are at the focus of my rule-consequentialist account of rules governing conduct in war.

2. RIGHTS, RULES AND CONSEQUENCES.

In this chapter I will first argue that a body of public rules can be morally justified by the consequences of those rules. Then I will argue that if public rules concerning conduct in war can be grounded in this rule-consequentialist principle, the most plausible interpretation of the core value is a concern for minimising rights violations.[1]

Though my interest is in international law governing armed conflict, I attempt to draw out some broader conclusions concerning the justification and formulation of rules. To clarify, my argument is concerned with sets of rules for public life, optimal principles of social regulation; it is not to do with connecting the meaning of 'rightness' to the following of rules (for example, a 'principle that acts are morally permissible if and only if allowed by the rules... selected'[2]). Neither is this intended to be a historical explanation of how any bodies of social regulation came into existence. It is not an exercise in political science, but a properly moralised view exploring the plausibility of a consequence-oriented moral justification of public rules. Nonetheless, since I will be interested in rules intended for real-world non-ideal conditions, the justification ought to take account of political realities such as non-compliance.

Beginning with the claim that the moral grounds of a set of rules could be that following them would lead to better consequences than any alternative set, I present a sequence of problems with and revisions to that claim, to reach a plausible consequence-oriented justification criterion for rules. The resulting

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[1] In Appendix 2 I lend empirical support to this interpretation by showing that there is a convergence on this underpinning moral concern.
[2] B. Hooker, *Ideal Code, Real World* (Oxford: Clarendon Press, 2000), 31.

formulation restricts the relevant consequences to some specified domain(s), does not assume full compliance, and recognises that any set of rules that we claim are justified is probably not the best possible set – there will be some improvements not yet thought of.

Some of the arguments leading to my formulation entail problems for this consequences-of-rules approach. In this chapter I address the first, which is that the need to recognise effects of partial compliance leads to the following possibility: we want agents to believe that they ought to follow the rules, but at the same time rely on them routinely breaking the rules for the optimal outcome. The second problem arises when rules are inadequate or incomplete and agents have to rely on their own judgment of the consequences of their actions. This is a problem because, I will argue, one reason for following rules is that individuals are not very good at making such judgments in situations of high complexity and high stakes. I address this issue in the context of the application to the laws regarding armed conflict, in Chapters 3 and 4.

Justifying Rules by their Consequences.

Consider the claim:

C: rules R are morally justified because following R would lead to at least as good consequences as any alternative set of rules (or no rules at all).[3]

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[3] We cannot say 'better consequences' because that would entail that if two sets of rules would lead to equally good consequences (and these consequences were better than for any alternative rules), then neither of these sets of rules would be justified (and rules with a suboptimal outcome would also not be justified).

A familiar complaint is that the total or ultimate consequences of either individual actions or sets of reiterated actions (following the rules) can never be known. However, it is not the case that all sets of rules have the aim of bringing about the best total consequences. Often, rules will have the purpose of bringing about the best outcome with respect to some more restricted domain. For example, the relevant factors when judging road traffic laws may primarily be road safety and ease of traffic flow. Certainly these two parameters will compete and conflict, and the overall goal to be pursued may be some acceptable balance of the two. But the point is, we do not take into account all the remote consequences of the traffic laws in order to judge whether they are justifiable.[4] We should be careful not to oversimplify here. Continuing the example of road traffic laws, it is not the case that all remote consequences ought or can be taken into account, but neither is it the case that we ought to confine ourselves to the more immediate domain of traffic considerations. For example, in addition to road safety and traffic flow, the impact of pollution (perhaps with a concern for child health) could also legitimately be a concern for legislators. A range of consequences - some more immediate and some less so - are taken into account, but not total consequences.

So when judging sets of rules we can restrict the domain over which we judge. If that is correct, we can amend C:

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[4] For example, suppose Mr Smith meets Miss Jones while their cars are stopped next to each other at a red light (and they would not otherwise have met). They marry, and their great-grandson goes on to be responsible for the worst genocide the world has ever seen (massively more harm, let us suppose, than would have occurred if traffic lights had been replaced by some less effective means of traffic control). We would not say that the traffic regulations – including the rule 'stop at a red light' – were for that reason unjustifiable. For the claim that we can never be certain of the consequences of actions, see J. Lenman, "Consequentialism and Cluelessness," *Philosophy and Public Affairs* 29(4) (2000): 342-370.

C1: rules R are morally justified because, with respect to value(s) V, following R would lead to at least as good consequences as any alternative set of rules (or no rules at all).

We can then fill in for V the preferred conception of the bundle of values that ought to be promoted (equality, justice, minimising rights violations, maximising utility, etc).[5] There is no reason to demand that the justification of each of the rules pertaining to a particular domain ought to involve the pursuit of the entire bundle. Some rules could be concerned with the consequences for a particular value, others could be concerned with some other value. And the justification of some rules may involve recognising a need to compromise between, or trade-off, these values.

Issues of Compliance.

The type of compliance problem that concerns me here is brought out by the following example: suppose a town council requires all residents to recycle glass, paper and plastic. The council estimates 90% compliance and designs recycling facilities to deal with that amount of materials. Subsequently, 90% compliance gives optimal outcome for the council's recycling programme, and 100% compliance would give a suboptimal outcome as the council has to bear two rounds of transport costs for the 10% of collected material it cannot process – the cost of collection from residents then the second cost of taking to the landfill.

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[5] We ought to make limitations on what V can stand for. If an evil person valued gratuitous harm to others, rules that brought about the most amount of harm to others would not thereby be morally justified. We have to be able to argue for V as a value the promotion of which is morally justifiable. For example, if within a given domain we could present a plausible moral argument for promoting human rights as a morally justifiable aim or goal, then C1 could be concerned with rules that best promote human rights. If in another domain we could present a plausible moral argument that preventing human rights violations ought to be the core value, then C1 could be concerned with rules that lead to the least violations of human rights. But, since promoting gratuitous harm is not a morally justifiable aim or goal, this is ruled out as a possibility for value V.

Here, less than full compliance (by agents who are not seeking to promote V, they just fail to comply for selfish reasons) could lead to a better outcome than full compliance. Moreover, agents aiming at achieving the best outcome, who know the facts of the situation, have very good reason to be confident in their own ability, and who know they will not set a bad example (because no-one will find out), seem to have good reason to break the rules here.[6]

The rules could be rewritten to require 90% of households to recycle. Those new rules could lead to a better outcome if they had 100% compliance, but if that is not the case (remember the lazy/selfish agents who are not trying to optimise), the outcome will be worse than the original rule.

From these problems, we can conclude that consequentialist arguments should look at the consequences of the expected level of actual compliance, not hypothetical compliance (which is irrelevant),[7] and ought not to assume 100% compliance (which is unrealistic).

C2: rules R are morally justified because, with respect to value(s) V, the expected level of actual compliance with R would lead to at least as good consequences as the expected level of actual compliance with any alternative set of rules (or no rules at all).

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[6] For example, if they somehow know that 90% of the town have already put out their recycling this week, so to keep compliance at 90% they (covertly) throw away their glass instead of recycling.
[7] D. Rodin, "The Problem with Prevention," in *Preemption: Military Action and Moral Justification*, ed. H. Shue and D. Rodin (Oxford: OUP, 2007), 156.

But now the motivation for following the rules vanishes. With C1, an agent's reason for following the rules was that doing so leads to the best outcome for V. But now we have recognised that non-compliance can have a positive effect on V. Why follow the rules *if doing* so is not necessary for best value for V?[8] Some reasons why agents might follow the rules are: people believe that wilful failure to comply would undermine future compliance by others; people follow rules for rules sake, (because a rule compliance culture has been fostered); there is an 'external' reason - threats of punishment;[9] people falsely believe that content of the rules is such that following them really will bring about the best outcome with respect to V (if this belief is fostered by the authorities, we have a 'government house' approach); people believe that the rules are fair or reasonable, and some obligation of fairness requires them to comply.[10]

I see no reason to over-simplify and insist that one of these five reasons would or ought to dominate the others. Compliance with a system of rules may well rely on a combination of these reasons. But this raises a further problem: why would you want people to believe they ought to comply (and so to actually comply) under those conditions where less than full compliance yields a better outcome? Possibly, you need people to believe that 100% compliance with rules will bring about the best outcome with respect to V, because wilful failure to comply would undermine future (desirable) compliance by others.[11] Alternatively or additionally,

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[8] A. H. Goldman, "The Rationality of Complying with Rules: Paradox Resolved," *Ethics* 116(3) (2006): 1-2.

[9] A further advantage of C2 is that the recognition that compliance will inevitably be partial motivates inclusion of rules to deal with rule-breaking

[10] Goldman cites Alexander & Sherwin's claim that we cannot close the gap between rules that we have reason to impose, and reasons to not comply, (Goldman, op. cit. p 4), but argues that considerations of group obligations and fairness can resolve the problem.

[11] The possibility of the rejection of a publicity requirement for moral theory was viewed by Sidgwick as a conclusion of utilitarian thinking; Williams presented this as a criticism - the 'Government House approach reflected the 'colonial elitism of Sidgwick's time'. J. Driver, "The

you don't want people messing around with trying to directly calculate the consequences of their actions because that would lead to an even worse outcome than that yielded by everyone following the rules.[12]

However, there is still the worry of how to deal with routine rule-breaking by agents aiming at achieving the best outcome, who know the facts of the situation, have very good reason to be confident in their own ability, and where they will not set a bad example (because no-one will find out). Perhaps we should accept (routine, non-supreme emergency) rule-breaking by agents who really do have good reason to believe they know that breaking the rules would lead to a better outcome in the particular situation before them (and that no-one would discover their rule-breaking).[13]

In the context of rules governing war, I will return to issues of compliance. In Chapter 3 I address Rodin's 'compliance effect' problem (compliance cannot be held as a constant in comparison of rules), and in Chapters 3 and 4 I address the problem of burdens imposed by the non-compliance of others.

Sub-Optimal Rules and Satisficing.

There remains the question of whether a given body of rules really would lead to the best outcome with respect to V. It is possible, or even probable, that some alternative set of rules or amendments to the current rules could lead to a better outcome; but we have not yet figured out what these improvements are. So if we

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History of Utilitarianism," *The Stanford Encyclopedia of Philosophy (Summer 2009 Edition)*, Edward N. Zalta (ed.). http://plato.stanford.edu/archives/sum2009/entries/utilitarianism-history/

[12] I give reasons why this may be the case in chapter 4.

[13] Preventing this by some sort of 'government house' approach (convincing agents that following the rules really would lead to the best outcome despite how things may appear) cannot be right because at the same time, as I will argue in chapter 3 we would rely on agents breaking the rules to give the best outcome in supreme emergency.

argue that the current rules are morally grounded in the claim that they would lead to a better outcome (with respect to V) than any alternative rules, then they fail to be justified if they turn out not to achieve this end.[14] And we think that is probably the case.

However, morality cannot require the impossible, and for any set of rules it would be impossible to know with absolute certainty whether it is the optimal set (or an optimal set – there could be more than one), even with the restricted domain of value V. So morality cannot demand that for any set of rules, we know that it is the (an) optimal set. Hence if a set of rules could be morally justifiable on the grounds that it would lead to a desirable outcome with respect to V, then it will be a set that we believe is, possibly, sub-optimal (that is, can be improved upon). If such a set could be morally justified, then we need to explain what would make it so.

It would appear that the most we can say for a given set of rules is that it would be the best current attempt at a set of rules aiming to achieve the goal of the best outcome with respect to V. But then we have just shunted the epistemological problem one step further down the line; we now need to explain how we could know that the rules are the best current attempt. The most we can demand in this regard is that they are reasonably considered to be best current attempt. (We could not bring in the 'reasonably considered' qualification earlier, requiring that the rules are reasonably considered to be the optimal set. This is because for any set of rules the 'reasonably considered' criterion would point to it being, probably, not the optimal set. We have to acknowledge that there is probably some way in which the rules could be improved, even if we cannot currently see what or where

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[14] Hooker, op. cit. at p 72. Although Hooker is concerned with rules as criteria for moral right and wrong, this claim is equally relevant here.

that improvement would be. On the other hand, we could research attempts at rules and give reasons to support a claim that one set R is better than the others that are currently available.)

If a consequentialist justification of a set of rules were to require that we knew they were the optimal set, then no sets of rules would pass this test. So if a set of rules can be justified by appeal to the consequences, then the most that can be required of those rules is that they are reasonably considered to be the best current attempt at a set of rules aiming to achieve the goal of the best outcome with respect to V.[15] This leads to the final amendment:

C3: rules R are morally justified because they are reasonably considered to be the best current attempt at rules having the aim that, with respect to value(s) V, the expected level of actual compliance with R would lead to at least as good consequences as the expected level of actual compliance with any alternative set of rules (or no rules at all).

An alternative solution to this problem is to abandon the maximising strategy ('better consequences than any alternative set of rules (or no rules at all)'), and adopt a satisficing principle. Slote[16] says that satisficing is often characterised as seeking something other than the optimal good (although he says the term may

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[15] What do I mean by 'reasonably considered'? A reasonable person (one who uses inductive logic, finds reasons for and against, has an open mind, is aware of own dispositions) could reach this conclusion, or this could be the conclusion of reasonable discussion (aiming to reach agreement but prepared to find intractable disagreement, crediting others with good faith). See Rawls 'Outline of a Decision Theory for Ethics' and 'The Domain of the Political and Overlapping Consensus', both in *John Rawls: Collected Papers,* ed. Samuel Freeman (Cambridge Massachusetts: Harvard University Press, 1999), 2 – 3 and 478 – 479.

[16] M. Slote, *Beyond Optimising* (Cambridge Massachusetts: Harvard University Press, 1989), 53 – 54, for example.

also refer to rejecting the available better for the available 'good enough' (and defends this as rational)).

Elster[17] presents several different versions of the idea of sufficing. We should note that he is concerned with theories of rational behaviour rather than the justification of sets of rules. Nonetheless, the ideas he presents can be applied to the enquiry here. Empirically, Elster says, businessmen rarely deliberately search for the optimum; to do so can be damaging to their interests. For example, a manufacturing firm could seek the optimal solution to some technical problem but go bankrupt before finding that solution.[18] Rather, agents set some goal and then adopt the first course of action that satisfies this minimum goal. This behaviour receives logical support from the view that the maximising strategy is just not realisable (even in principle).

Incorporating that idea into the justification criteria we get:

C4: rules R are morally justified because, with respect to value V, the expected level of actual compliance with R would lead to good enough consequences.

So the focus has shifted from the 'best consequences producible in the circumstances', to depending merely on the goodness of the consequences.[19] Note that while the original motivation for this shift from maximising was (according to Elster) because the search for the optimum uses valuable time and resources

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[17] J. Elster, *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1979), 57-60 and 133-137.
[18] Ibid. p 57.
[19] See Slote, op. cit. p 28.

that could be put to better use, here, it satisfies the complaint that we cannot know that rules R would produce better results for V than any other rules.

For C4 to improve on C2 with respect to the epistemological problem, we rely on the assumption that it would be easier to know that a minimum target value for V would be reached,[20] than it would be to know that the optimal value for V would be attained. To accept C4 as an improvement on C3, we need some account of the justification for accepting a 'good enough' minimum value for V, rather than seeking the best we can. As I will now argue, this feature of C4 is problematic.

Bradley says that any argument for satisficing must show "(i) that the move to satisficing is necessary to solve some problem... and (ii) that there is a version of the view that does not permit the gratuitous prevention of goodness".[21] On the first point, the move to satisficing has been motivated by the epistemological burden of the maximising formulation. The second point is further analysed by Rogers as either acts that gratuitously result in a suboptimal outcome, or gratuitously making the situation worse.[22] We again need to be careful as Bradley and Rogers are interested in act-consequentialism, and satisficing consequentialism as a standard of right and wrong, rather than the justification of sets of rules. However, according to C4 legislators could draw up rules R1 that met the 'good enough' level and then (gratuitously) not seek any further improvement in those rules (because the imposition of R1 is justifiable - assuming no further material changes such as the development of new weapons). Furthermore, if legislators could choose between rules R2 that met the 'good enough' criteria and rules R3 that they believe would

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[20] Or perhaps simply that a good enough outcome would be attained.
[21] B. Bradley, "Against Satisficing Consequentialism," *Utilitas* 18 (2006): 108.
[22] J. Rogers, "In Defence of a Version of Satisficing Consequentialism." *Utilitas* 22 (2010):198-221. While Bradley attacks satisficing consequentialism, Rogers defends it.

lead to even better consequences with respect to V, according to C4 they could gratuitously select R2. This problem would be even more acute if R3 were the current rules, and R2 were some new set of rules.

These criticisms[23] assume that satisficing is an alternative to maximising; that the 'good enough' target will be for a lower value of V than the optimal value, and therefore that there would be a difference between the rules that would be justified by C3 and C4. However, Elster presents another view of satisficing; that it is really a maximising principle, when all costs are included. That is, the 'good enough' target is set such that an attempt to attain a higher value of V would involve too heavy a cost, and would actually result in lower value for V. Understanding satisficing in this way we could rewrite:

C4*: rules R are morally justified because the expected level of actual compliance with R would satisfice with respect to V.

But our epistemological problem bites again here. How could we know that the 'good enough' satisficing target would really maximise? Should we adopt a satisficing strategy for this problem too? Elster refers to Winter's argument that in order to avoid an infinite regress of satisficing, at some point we have to select a 'good enough' goal.[24] And this may as well be at the start rather than after a chain of 'satisficing'. Certainly this target may coincide with the ideal optimising 'good enough' target, but that would be down to luck or intelligent guesswork. The main point here is that since C4 also involves setting a 'good enough' target that with

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[23] As applied to my rule consequentialism.
[24] Elster, op. cit. p 135.

luck or intelligent guesswork might be the ideal optimising target, C4* is not really distinct from C4.

Elster concludes that Winter's argument 'demolishes'[25] the satisficing-as-maximising interpretation. However, we could adopt the earlier strategy to answer the epistemological problem with the satisficing target and claim:

C4:** rules R are morally justified because they are reasonably considered to be the best current attempt at rules having the aim that the expected level of actual compliance with those rules would satisfice with respect to V.

But now C4** is not really distinct from C3, for the following reason. There is a way in which C3 embraces something like the concept of satisficing. Above, when considering the compliance problem,[26] I argued that failing to take account of actual compliance when designing rules can lead to sub-optimal outcome. Rules appearing to aim for a sub-optimal outcome could lead to better results than those appearing to aim for the best outcome. So rules aiming at 'good enough' consequences could be justifiable, by C3, if they would lead to a better outcome than those aiming directly at the best outcome.

Hence if satisficing is understood as a strategy for maximising, then C3 and C4** could both justify the same rules R; in the former 'satisficing' enters at the level of rule formulation, for the latter it enters at the level of the moral justification. I do not think there is a reason to select C4** in preference to C3.

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[25] Ibid. p 59.
[26] The 'recycling' example.

To sum up, the attempt to produce a criterion for the justification of a body of rules for public life or social regulation has led me to C3. The formulation C4** could be an alternative if there were a reason for preferring satisficing at the level of justification rather than rule-formulation. Considerations of partial compliance led to the seeming paradox of requiring agents to believe that they ought to follow the rules, while rule-breaking will sometimes lead to a better outcome and the rules may well rely on routine rule-breaking to deliver the optimal outcome.

Concern for Rights as the Core Value.

In the remainder of this chapter I will argue that if International Humanitarian Law concerning conduct in war can be morally grounded in a rule-consequentialist principle, the most plausible interpretation of the core value is a concern for minimising violations of (some, to be specified) rights.[27] However, even in this form, the rule consequentialism cannot account for all laws regarding war. Hence the attempt to find moral grounds for the body of public rules regarding war will necessarily lead to a pluralistic account, appealing to a range of irreducible fundamental principles.[28]

To begin with, an initially plausible interpretation of the core value motivating the laws of conduct in war seems to be a concern for reducing human suffering. Support for this can be found in the preamble of Geneva Protocol 1: 'Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their

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[27] Lazar, concludes that "it seems that the prospects for grounding the ethics of war in individual rights are poor" (S. Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy and Public Affairs* 38(2) (2010): 13). But since the object of his argument are rules that mirror the content of those rights, whereas mine is not, we need not disagree.

[28] Understanding 'pluralism' to refer to the view that any moral justification of the body of public rules – the rules of social regulation – that constitute the 'international laws concerning conflict' would have to appeal to a variety of moral principles.

application' and in the opening words of the Hague Convention 'the wording of which has been inspired by the desire to diminish the evils of war'.[29]

While the sense of these extracts seems to suggest that the value being pursued by those rules is reducing human suffering, the content of laws governing conflict do not support this interpretation. If the goal of laws of war were simply 'to reduce suffering' then it would be reasonable to suppose that there would be, for example, a legal obligation to provide food supplies to needy noncombatants of enemy states; but there is not. (Note: I am not claiming there are no obligations to provide aid to needy noncombatants of hostile states; only that no such obligations are the subject matter of laws of war, nor of any peremptory norms.[30]) The absence of this law could be explained if the effect of such a rule would not be to reduce human suffering; perhaps it would weaken the war effort of stronger parties or strengthen those of the weaker and thereby increase suffering by prolonging wars. Whether that would really be the case would require empirical investigation, but several points can be made against it. First, aiding needy noncombatants of enemy nations does not necessarily weaken or strengthen military capability; and secondly, even if it did, this need not prolong conflicts. Thirdly, prolonging a conflict does not necessarily increase suffering; an ongoing 'low-level conflict' may in the long run result in less suffering even if this situation continues with no clear end in sight, compared with a scenario where one party launches full-scale military action leading to a quicker resolution. Finally, a rule requiring sending food to starving civilians would seem, *prima facie*, a good way of reducing human

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[29] A. Roberts and R. Guelff. eds., *Documents on the Laws of War* (Oxford: OUP, 2000), 422 & 69.
[30] See Appendix 2 for detailed discussion of peremptory norms. As stated above (page 7), UN Resolution 1674 does require such assistance, but applies to UN peace-keeping and peace-building operations, not universally to belligerent parties in all conflicts.

suffering. If that is right, a goal of simply 'reducing human suffering' would require laws that are not present in rules governing conflict.

My argument against the 'reducing human suffering' interpretation of the goals of the laws of war is that it just does not support those laws. A better interpretation is that laws of war are more concerned with the wrongness of doing certain things to persons.[31] For example, laws governing conflict are rightly concerned with harms caused by violations of bodily integrity and so will outlaw certain weapons (e.g. bullets designed to deform on impact thereby causing greater damage to internal organs). They are not, on the other hand, concerned with claims that persons[32] ought to have access to restorative or remedial programmes of health care in order to achieve a certain level of bodily integrity, entailing claims on other persons that they provide resources to meet this claim (e.g. a right to have organ transplants provided by a state health-service).

Similarly, a person may have a justifiable claim that they are entitled to a certain minimum level of subsistence (I am not arguing that they do – or do not – have such a claim). But laws of conflict are more concerned with preventing persons from having subsistence unjustifiably taken away from them (e.g. the prohibition on attacking civilian infrastructure[33]), rather than with a claim that resources ought

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[31] Kutz recognises that the emphasis of the function of laws of conduct in war is connected more with preventing certain harms rather than providing benefits to reduce suffering; for example, 'Given the overwhelming international interest in a stable, violence-reducing regime of war'; ... if their [the laws] central function is identified with making some difference in war's savagery'; and 'the basic rules of POW status are aimed at preventing a retaliatory bloodbath of prisoners; the rules of discrimination and proportionality, likewise, protect against the annihilation of an enemy state's citizens'. C, Kutz, "Fearful Symmetry," in *Just and Unjust Warriors*, eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 74 - 75.

[32] That is, *all* persons, as is the case with violations of bodily integrity. Geneva Conventions do require adequate medical assistance for prisoners of war.

[33] 1977 Geneva Protocol 1 Article 54, Roberts and Guelff, p 450.

to be provided to enable persons to achieve a certain level (e.g. a requirement to build civilian infrastructure).

I suppose there is a way in which the above mentioned claims are the subject matter of laws of war, in that my claim of entitlement to healthcare or a certain level of subsistence is not proportionate, in itself, to justify waging war. But in the same way, your irritation at my wearing brown shoes with a blue suit could be the subject matter of laws of conflict, in that your irritation also would not count as justification for waging war. So I will discount that line of argument as trivial.

The above examples are meant to show that fundamental values that are the grounds of laws of war are concerned with the wrongness of doing certain things to persons, not with any claim that others ought to provide certain goods (if doing so would reduce suffering). This idea of a system of prohibitions, permissions and requirements in which certain acts are wrong, where the failure to perform some other act that would lead to qualitatively and quantitatively similar suffering would not be wrong, is captured by the concept of rights and duties.

The distinction between entitlements to non-interference and entitlements that others provide some goods or service is often referred to as the distinction between negative and positive rights, respectively.[34] Corresponding to these we can also have negative and positive duties. The former are duties not to interfere

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[34] L. Wenar, "Rights," *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2008/entries/rights/. Wenar points out that the positive and negative rights distinction is not exhaustive of rights. Positive and negative rights are 'passive' rights, meaning that the holder has a right that others do or refrain from doing something. In addition there are 'active' rights, meaning that the holder has a right to do (or refrain from doing) something.

with others in some specified way, the latter are duties to provide some good or service.

Let us return to the example of arms restrictions. According to the laws of war, armed forces of country X have a claim against country Y (that is, they have a negative right) that Y does not deploy chemical weapon W that causes deterioration of the lungs (call this illness Z). Country X does not have a claim against Y (they do not have a positive right) that Y provides healthcare for all X's citizens suffering from Z (assuming Y has not used W against X). Or, in terms of correlate duties,[35] Y has a (negative) duty not to use this weapon, but has a liberty (no positive duty) not to treat X citizens suffering from Z.

Hence I claim that if the moral grounds of the laws of conduct in war are to be found in a form of rule consequentialism, then the core value (V, in formulation C3) is a concern for the reduction of violations of certain rights. If this is correct, persons have a right that certain things are not done to them, such as violent threats to subsistence and bodily integrity, and the laws of war are concerned with violations of these rights. The moral grounds of these public rules – given the inevitability of wars and the inevitability of rights violations therein – lies in their efficacy in minimising violations of these rights (or maximising compliance with negative duties not to do certain things to persons). Hence C3 becomes:

Laws concerning armed conflict are morally justified because they are reasonably considered to be the best current attempt at rules having the aim that, with respect to violations of certain rights, the expected level of actual

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[35] D. Rodin, *War and Self-Defense* (Oxford: OUP, 2002), 19.

compliance with those laws would lead to at least as good consequences as the expected level of actual compliance with any alternative set of rules (or no rules at all).

And since we are concerned with whether those rules would lead to better consequences, that should read:

Laws concerning armed conflict would be morally justified if they were reasonably considered... etc.

Now, regarding the entire body of rules to do with war the picture is more 'messy' than I have presented it so far. The Geneva Conventions, for example, include duties to rescue shipwrecked sailors.[36] Emerging norms regarding humanitarian intervention perhaps are another example of a duty to rescue (the correlate of a claim that others do something, rather than the correlate of a claim that they refrain from doing something). So grounding all laws of war in a fundamental value characterised as negative duties to refrain from doing certain things to persons does not seem to be quite right.

In the latter example if the laws permit rather than require intervention for humanitarian purposes, this could be explained as a permission to act on behalf of a third party, to prevent rights violations. Duties to assist shipwrecked sailors will not fit into the scheme so easily. I would be reluctant to press a 'merely verbal' solution, such as X's act of non-assistance to Y violates Y's right that X ought not to perform acts of non-assistance. Maybe a better response would be to admit the

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[36] Geneva Convention II Article 3 (2) 'The wounded, sick and shipwrecked shall be collected and cared for.' Cited in Roberts & Guelff. op.cit. p 223.

counter-example and qualify my argument; the principle that grounds the laws governing conduct in conflict is, with few exceptions, rule consequentialism aiming at the reduction of violations of certain rights (such as violent threats to subsistence and bodily integrity).

Another area of the public rules of war that does not fit in with the rule-consequentialism account is the right of states, in international law, to engage in acts of defensive force. I will argue in Chapters 6 that the correct interpretation[37] of this rule permits use of defensive force against a threat of sufficient gravity. Crucially, this does not mean that the threat, if left unresisted, would have to outweigh harms caused in war; it just has to be sufficiently weighty to warrant the latter. A state's response when justifiably acting in accord with this rule could result in an increase in rights violation. Moreover, that could be the case in many or all appeals to this rule. Hence it does not have a place in my rule consequentialism, and therefore if it has any moral justification at all, it must be found elsewhere. In Chapter 6 I will argue that the justification of this law can be grounded in the right of self-defence. Hence my account of the moral grounds of laws of war will in the end be firmly pluralistic. This should not be surprising; it would be more surprising to find that a single moral principle could account for the moral grounds of the entire body of the laws concerning war.

In the following chapters (3 - 5) I will focus on the rule-consequentialist account of the moral grounds of (some of the) laws of war. In appendix 2 I lend empirical support to the foregoing account by way of a case study of consensus regarding

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[37] Correct from the point of view of a morally justifiable application of the law.

the prohibitions on violations of certain rights that are at the focus of my rule-consequentialist account of rules governing conduct in war.

3. CHALLENGES TO THE 'RULE-CONSEQUENTIALISM' CONCEPT OF LAWS CONCERNING ACTIONS IN CONFLICT.

Introduction.

In this chapter I will defend the claim that the norms governing conduct in war can be justified on rule-consequentialist grounds. I consider and respond to eleven objections and problems, as follows.

First, Rodin's arguments against consequentialist justifications of laws of war:

1) It is not obvious that the Allied campaign against Nazi Germany would be justified on a consequentialist account (and this is a paradigm example of justified resort to armed force).[1]

2) Armed conflict is too complex for cost / benefit analyses.[2]

3) Consequentialism is more useful for retrospective analysis rather than a guide for future action.[3]

Three more criticisms from Rodin specifically target rule-consequentialist justifications of laws concerning war.

4) The 'impasse problem': given a plausible judgment that act X ought to be prohibited because the existence of that rule would lead to better overall

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[1] D. Rodin, *War and Self-Defense* (Oxford OUP, 2002), 10 – 11.
[2] Ibid. p 11
[3] D. Rodin, "The Ethics of Asymmetric War," in *The Ethics of War*, eds. R. Sorabji and D. Rodin, (Aldershot: Ashgate Publishing, 2006), 157.

consequences, a plausible case can be made to support the claim that a rule permitting X would lead to better overall consequences.[4]

5) The 'epistemological problem': the 'radical indeterminacy of consequences' in war means that there are not sufficient empirical data for assessing the truth of rule-consequentialist judgments.[5]

6) The 'compliance effect problem': in order to maintain compliance with and so viability of international law (thereby leading to better overall consequences), we may have to grant legal exemptions to powerful states to engage in activity that would otherwise be illegal (that is, actions that they are intent on undertaking regardless of the law).[6]

Other problems that I consider are:

7) The 'sub-optimal outcome problem': we can identify situations where following the rules would lead to a sub-optimal outcome; those rules then appear to be not justified, on consequentialist grounds.

8) The 'new rules problem': when the need for new rules for novel situations arises, there can be tensions between permissions (that is, lack of prohibitions) in the current rules, the moral grounds of those rules, and the need to secure agreement on new rules.

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[4] D. Rodin, "The Problem with Prevention," in *Preemption: Military Action and Moral Justification*, eds. H. Shue and D. Rodin (Oxford: Oxford University Press, 2007), 149.
[5] Ibid. p 154.
[6] Ibid. p 156.

9) The 'incomplete rules problem': where rules are incomplete, agents will have to calculate consequences directly (but the motivation for sticking to the rules even when it seemed better to break the rules was that we are no good at calculating consequences in complex situations).

10) 'Compliance problem 2': when rule-breaking by others means that following the rules would no longer lead to optimal consequences regarding rights-violations, can it be permissible to break the rules?

11) The 'unjust rules problem': rules recommended on consequentialist grounds - in particular, the equal right of all combatants to kill, regardless of whether they have just cause - appear to be unjust.

Rodin's First Three Arguments.

Rodin briefly considers consequentialism as a moral guide for questions on the ethics of war in 'War and Self-Defense'[7] and 'The Ethics of Asymmetric War'.[8] He rejects it on three grounds. First, it is not obvious that a consequentialist assessment of the Second World War would justify the Allied campaign against Nazi Germany, and that is surely a paradigm example of justified war. Second, armed conflict is far too complex to be subject to such a cost/benefit analysis as is required by consequentialism. Finally, if some assessment of costs and benefits can be made, consequentialism is most useful for retrospective analysis and least useful as a guide for future action.

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[7] Rodin 2002, pp 10 – 12.
[8] Rodin 2006, p 157.

Sinnott-Armstrong[9] gives several replies to the first claim. Amongst them, he claims that going to war against Nazi Germany may well have minimised harms, and that from the viewpoints of single countries, going to war when they did would have better consequences than not doing so.

The target of Rodin's other two criticisms outlined above is a direct application of cost/benefit analysis, whereas as a system of rules to minimise rights violations[10] is an indirect form of consequentialism. And in my account the rules, not the cost benefit analysis, are the guide for future action, while retrospective analysis of costs and benefits in armed conflict can contribute to determining the substance of those rules.[11] Hence these criticisms do not undermine the idea of the public rules concerning war as a form of rule consequentialism.

The 'Impasse Problem' and the 'Epistemological Problem'.

Rodin[12] returns to his critique of consequentialist approaches to ethics of war, presenting the 'epistemological problem' in more detail and two new arguments against this approach, the 'impasse problem' and the 'compliance effect problem'.

Rodin's discussion focuses on Luban's three rule-consequentialist arguments against a general permission to wage preventive war,[13] which are that a norm permitting preventive war would make war more likely for three reasons; it would broaden the category of permissible war, introduce too much ambiguity into laws

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[9] Walter Sinnott-Armstrong, "Preventive War, What Is It Good For?" in *Preemption: Military Action and Moral Justification*, eds. H. Shue and D. Rodin (Oxford: Oxford University Press, 2007), 209-210.
[10] I use this as a shorthand for the formulation worked out in Chapter 2, or something like it.
[11] I will say more about this below at p 56.
[12] Rodin 2007.
[13] And hence on issues of *jus ad bellum*, rather than *jus in bello*. Luban's arguments are found in D. Luban, "Preventive War," *Philosophy & Public Affairs* 32(3) (2004).

of war, and make rival states into potential threats. However, Rodin's critique applies more generally to the adequacy of rule-consequentialist approaches. While his direct concerns here are issues of *jus ad bellum*, he makes it clear that his argument is that a 'consequentialist approach to war *quite generally* suffers from two traditional vulnerabilities of consequentialist theory'.[14] So it is worth considering in detail, as having relevance to issues of *jus in bello*.

The 'impasse problem' runs as follows: given a plausible judgment that act X ought to be prohibited because the existence of that rule would lead to better overall consequences, a plausible case can be made to support the claim that a rule permitting X would lead to better overall consequences.[15] This problem is so deep-seated that it is true of all laws of war,[16] including the existence of any *jus in bello* constraints. Hence there is no conclusive reason to prefer one rule (or set of rules) over another contradictory rule, if the justification for the rules is a claim that they lead to better overall consequences.

This problem arises out of the 'epistemological problem': the 'radical indeterminacy of consequences'[17] in war means that there are not sufficient empirical data for assessing the truth of rule-consequentialist judgments. It is impossible to judge that a rule is justified on the grounds that its existence leads to better overall consequences, because we cannot reliably judge that its existence leads to better overall consequences.

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[14] Rodin op. cit. p 145, my emphasis.
[15] Ibid. p 149.
[16] Ibid. p 154n.
[17] Ibid. p 154n.

Rodin considers two responses to the epistemological problem. First, if the 'long-term consequences of complex decisions and the rules that might govern them are always indeterminate',[18] how can we then account for the (clear and appropriate) usefulness of consequentialist reasoning in other fields? His reply is that there are problems associated with predictions regarding war that are not present in other fields, or are present in war to a far higher degree. These include the immense scale of war's effects, the problem of escalation, the role of chance, and a persistent psychological tendency to overestimate benefits. There are simply too many variables to be taken into account.[19] The ineffectiveness of predictive models is exemplified by the US experience in Iraq; possession of 'virtually unparalleled' military superiority does not guarantee success in achieving war objectives.

The second response to the 'epistemological problem' Rodin considers – on behalf of the proponents of consequentialism - is that if the claim of radical indeterminacy is true, then it is equally damaging to deontological theories. Specifically, it implies the indeterminacy of the *jus ad bellum* proportionality constraint in Just War theory, which requires weighing predicted benefits and harms.[20] His reply to this is that the Just War proportionality constraint can be interpreted in two ways. If (*jus ad bellum*) proportionality were interpreted negatively, taking it to mean that war would not be justified if the moral costs would be grossly disproportionate to the expected benefits, then that would require judgments that can be made with an acceptable level of certainty (at least on some occasions). A positive interpretation of (*jus ad bellum*) proportionality would require a positive judgment that the good

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[18] Ibid. p 154.
[19] Ibid. p 154.
[20] Ibid. p 154.

outweighs the bad; but this would not make the theory indeterminate. It would simply mean that where this is impossible to determine, war would not be justified. Hence the positive interpretation of proportionality would make Just War theory highly restrictive, but would not be indeterminate.

Now, since the 'impasse problem' arises as a result of the 'epistemological problem', I shall defend my argument against the latter, since that will also give a response to the former.

Rodin clarifies the aims and structure of the types of theories he is going to criticise. 'Rule-consequentialism requires assessing the long-term consequences of iterated patterns of behaviour'.[21] The long-term patterns of behaviour to be assessed should not be those expected under hypothetical conditions of full compliance with the rules; it should be actual expected consequences (that is, with less than full compliance).[22] So it is the consequences of the existence of the rule that is being assessed. The correct rule is the one that, compared with other rules (or no rule), leads to 'better overall consequences'.[23] The relevant domain to be assessed is the 'ultimate consequences'.[24] And this characterisation leads him to the epistemological problem; given the huge reach of the effects of war, how can we ever determine what those overall consequences will be?

However, my account does not count the cost of the overall consequences. I have argued that the aim of the laws governing conduct in conflict is to minimise violations of certain rights (such as violent threats to subsistence and bodily

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[21] Ibid. p 149.
[22] Ibid, p 156.
[23] Ibid. p 150 & 152.
[24] Ibid. p 150.

integrity); and judgments regarding this more limited domain would be less risky than judgments of 'ultimate' consequences.

I should make clear that I am not claiming that we can discount the moral importance of events just because they are temporally (or even spatially) remote. First, the claim that we do not have to consider 'ultimate' consequences involves limiting the domain of concern to violations of certain rights rather than having to consider all benefits and losses. It does not limit the domain temporally. Second, while both Goodin and Parfit argue that mere temporal distance does not justify discounting the moral importance of benefits and harms,[25] they do however both argue that uncertainty does give reason for discounting the values of benefits and losses[26] (and temporal distance can entail uncertainty). We ought to be aware though that this is analytically distinct from time-discounting, and sometimes considerations of probability may increase, rather than decrease, the certainty of some event.

(Also, Parfitt argues that consideration of 'special relations' might give reasons to give greater weight to those more closely related or connected to us, compared with those more remote.[27] Kasher argues for a similar principle in regard to military responses to terrorism.[28] Goodin, on the other hand, argues that there are general duties that we owe one another, regardless of kinship.[29] Nonetheless, if Parfitt's arguments are correct then there may be reason to discount the moral importance of those who do not have special relations with us, compared with those who do;

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[25] R. Goodin, "Discounting Discounting," *Journal of Public Policy* 2(1) (1982): 53-71; D. Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 480-486.
[26] Goodin p 56, Parfitt p 481.
[27] p 485.
[28] A. Kasher and A. Yadlin, "Military Ethics of Fighting Terror," *Journal of Military Ethics* 4(1) (2005): 3-32. The authors forwarded me the MS before publication.
[29] R. Goodin, "What Is So Special about Our Fellow Countrymen?" *Ethics* 98 (1988): 663 – 686.

and generations in the further future are more remotely connected to us than those in the near future.)

If it is correct that there is reason to discount the moral importance of harms of which we are uncertain (uncertain because if they occur, they will occur in the further future), then that supports the claim that public rules would be justified if the existence of those rules minimises the *foreseeable* violations of certain rights. It is not necessary to take into account all possible future outcomes of which we are uncertain, because their uncertainty justifies discounting in consequentialist considerations (and in many cases discounting can be realised as ignoring).

Furthermore, I have argued that we cannot be required to have knowledge that a particular set of rules actually does minimise violations in order for those rules to be morally justified. The set of rules could be judged morally justifiable on the grounds that they were reasonably considered to be the best current attempt at a set of rules the acceptance of which would achieve the goal of minimising violations of certain rights in war.

Finally, unlike act consequentialism which is committed to the difficult task of predicting future consequences, rule-based accounts can justify rules with a backward-looking assessment of the success of those rules in achieving their goals, in order to make judgments about expected consequences. However, as Rodin points out, the historical record can only indicate what actually happened; it cannot furnish counterfactual evidence of what would have occurred under some other set of rules.[30] Therefore - so the argument goes - backward-looking

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[30] Rodin op. cit. p 153.

assessment can never tell us if a set of rules is the optimum set (in this case, the set that minimises violations of the relevant rights). In reply, while the historical record cannot give us a 'controlled experiment' of the effect of rules with all other things being equal, it does give us examples of alternatives. From these a careful study taking account of variables could make possible a comparison of the effectiveness of rules. This is acceptable practice in modelling of complex systems in other fields of investigation, such as economic analysis.[31]

Taken together these considerations mitigate Rodin's epistemological problem. The formulation of our best current attempt at a set of rules with the limited goal of minimising rights violations in war can be helped by looking at the consequences of the existence or absence of rules in the past.[32] And though there would still be risk in such judgments, it would be to a lesser degree than with the radical epistemological problems associated with purely forward looking predictions of act consequentialism which are committed to direct application of consequentialist reasoning regarding future outcomes. The 'best current attempt' judgment with a limited domain of outcomes is also less risky than claims that we can know which set of rules will lead to the best overall or ultimate consequences.

The Compliance Effect Problem.

Rodin's 'compliance effect problem' arises from the observation that consequentialist arguments should look at the consequences of the expected level

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[31] For example, Fogel's claim that if the railroad had not been developed in North America, the economic impact would have been negligible (because roads and canals would have been improved instead). Fogel, R. *Railroads and American Economic Growth: Essays in Econometric History* (Baltimore: John Hopkins University Press, 1964). Other themes explored in counterfactual economic history include the economic effects of slavery.

[32] Though this may not be helpful for novel situations. I address that problem below at p 70.

of actual compliance, not hypothetical compliance (which is irrelevant).[33] Furthermore, we should be aware that the formulation of rules would alter compliance (that is, compliance cannot be held as a constant in comparison of rules). This leads to a 'painful dilemma';[34] in order to maintain compliance with and so viability of international law (thereby leading to better overall consequences), we may have to grant legal exemptions to powerful states to engage in activity that would otherwise be illegal (that is, actions that they are intent on undertaking regardless of the law).

Rodin considers two responses to this problem. The first reiterates the indeterminacy argument and questions how the consequences of different rules and rule changes can ever be worked out. The judgment that one rule will lead to better overall results than another just cannot be made. Second, when considering actions (torture, for example) that powerful states are going to take regardless of the law, an equally plausible case can be made that it would be better not to change the law to ensure compliance. It may be better (according to Byers[35]) if we maintain the illegality of these acts in order to prevent precedent-setting. But as Rodin points out, what then is the use of the law that fails to achieve its end.[36] In consequentialist terms: where is the benefit of the law if the strong get to do whatever they want either way?

Rodin presents the compliance problem in connection with the non-compliance of powerful states, but the problem can arise in other circumstances. For example,

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[33] Rodin 2007, p 156.
[34] Ibid. p 158.
[35] Ibid. p 158.
[36] Ibid. p 159.

consider 'supreme emergency' as discussed by Walzer and Nagel.[37] Typically, this is characterised by a state threatening the annihilation or enslavement of a another community, and the latter's only foreseeably effective means of preventing defeat requires violation of the laws of war, such as intentionally targeting civilians. The argument for granting exemptions might suggest that in conditions of supreme emergency there ought to be legal exemptions for the prohibition on targeting civilians, in order to maintain integrity and viability of the law when that community defends itself against unjust aggression.[38]

A reason to resist the idea of legal exemption is that such a permission would very likely be abused (either intentionally or under conditions of 'psychological deception'). If, on the other hand, agents are legally prohibited from targeting civilians even in cases where it is judged morally justifiable or excusable,[39] this prohibition would have the aim of ensuring that the action would be taken only in genuine situations of 'supreme emergency'. However, that last point recognises that it is at least possible that states would violate the law in those circumstances. Any such violation has the potential to undermine the legal prohibition, either within the framework of the law by setting a precedent for others (establishing a norm of customary international law), or by undermining the viability of international law. And undermining this legal prohibition has the potential to lead to increased (moral) rights violations. So this effect gives a reason to grant legal exemptions in cases of supreme emergency.

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[37] T. Nagel, 'War and Massacre', in T. Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979); M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 3rd edn. 2002), 251-268.
[38] Making the assumption that under these circumstances this community will target civilians, an action that is *ex hypothesi* necessary to avoid military defeat.
[39] By this I mean it would be morally justifiable or excusable in the absence of a law prohibiting the action. Whether it could be morally justifiable or excusable with the added factor of the action being illegal is (part of) the issue at point here.

Now, a state that faces supreme emergency is not necessarily a powerful one; a weak state could be in circumstances in which the only way to avoid catastrophic defeat is to target civilians. (In fact, I think it is more likely that a weak state or a non-state actor, rather than a strong state, would face supreme emergency, though do not have an argument to support the claim.) Hence compliance effects are not confined to law-breaking actions of strong states.[40]

I do not have a clear answer to this compliance effect problem, but note that the need to maintain the viability of the rules in conditions of wilful non-compliance would be a challenge for other accounts of the moral justification of rules. Certainly, for a Kantian account, altering the rules to accommodate powerful (or weak) would-be rule-breakers may not be an acceptable solution, and so the 'painful dilemma' would not arise. Nonetheless, maintaining the viability of the rules in non-ideal conditions would still be a problem. Certainly we can ask what is the use of the law when the strong do as they please; but we should view this as a general problem in law formulation, not one specific to either a deontological or rule-consequentialist account of the moral grounds of laws of war.

The Sub-Optimal Outcome Problem.

The compliance effect problem arises when decision-makers act on the judgement that following the rules would not lead to the best outcome for their interests.[41] A further problem arises for the rule-consequentialist grounding of laws of war if we

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[40] I discuss 'supreme emergency' in more detail at p 64.
[41] Given that laws of war constrain actions, decision-makers may frequently judge that following the rules would not lead to the best outcome for their interests.

can identify situations in war in which following the rules would not lead to the best outcome with respect to reducing rights violations.[42]

For example, there may be circumstances in which following the rule 'do not kill prisoners of war' does not reduce rights violations. Walzer describes such a case.[43] During WWII, the German authorities treated captured members of the French Forces of the Interior as rebels subject to summary execution. Later in the war when German soldiers surrendered to the FFI, 80 of these German POWs were shot, with the purpose of halting the execution of captured French combatants. After this event, German forces ceased the policy of executing partisans. Given that such situations exist, then it would appear that the rules cannot be morally grounded in the claim that following them leads to the best outcome. We can reasonably ask the question: what is the justification of the rules if following them leads to a sub-optimal outcome?[44]

This apparent problem can arise from the assumption that if rules are to be morally grounded in the outcome with respect to rights violations, then each instance of an action that is *prima facie* judged to be permissible or impermissible on those grounds, must be reflected in a permission or prohibition in the rules. This is too simple; we should also take account of the consequences of embodying a principle in the rules. Action X may be (*prima facie*) judged justifiable on the grounds that it has the best consequences regarding violations, but that does not necessarily entail that the consequences of legally permitting X would be morally acceptable, judged on those same grounds. For example, we ought to consider

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[42] That is, from the point of view of an impartial judgment, not merely with respect to one party's interests.
[43] M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 3rd edn. 2002), 208.
[44] A. H. Goldman, '"The Rationality of Complying with Rules: Paradox Resolved," *Ethics* 116(3) (2006): 1-2.

the possibility that legally permitting X (whenever it is judged that on this occasion doing X would have the best outcome) has the potential to lead to chaos and foreseeably result in a worse overall outcome with respect to those same values. Targeting civilians in war with the aim of reducing the overall harm to civilians (because you believe that your actions will shorten the war) is the sort of permission that could lead to worse overall consequences. Similarly, examples such as the POW case above are consistent with the claim that the moral grounds of the rules could be that they are a set of conventions or pragmatic co-ordination rules that taken together will best protect human rights.[45]

So the claim here is that the best overall outcome for minimising rights violations would be achieved where persons follow a system of rules, 'even if complying with that system sometimes means performing suboptimal action'.[46] The existence of examples in which the content of the rules and *prima facie* judgments[47] diverge regarding the core values is consistent with our rule-consequential formulation.

Still, we can push this line of objection further. Suppose an agent sincerely believes that action X which is prohibited by the rules would in this case lead to the best outcome and would not, in this case, escalate into chaos. This could be an officer who, say, considers targeting civilians as a means of shortening the war, and has reason to think that no-one will find out (perhaps because he will spuriously claim that the civilian losses were collateral harms of an attack on a

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[45] I will analyse civilian and noncombatant rights in detail in Chapter 4, and discuss how those moral rights might best be protected in the public rules.

[46] B. Hooker, E. Mason, & D. E, Miller, *Morality, Rules, and Consequences* (Edinburgh: Edinburgh University Press, 2000), 3. Although Hooker et al. are concerned with rules as criteria for moral right and wrong, this claim is equally relevant here.

[47] Shue argues that these *prima facie* judgments of actions notwithstanding, if the laws of war are morally the best set of laws, then morally right action will be to act in accord with those laws. Under those circumstances, there will be no 'morally correct action' that will diverge from the requirements of the law. H. Shue, "Do We Need a 'Morality of War'?" in *Just and Unjust Warriors,* eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 88 - 89.

legitimate military target). The purpose and moral grounds of the rules – the best outcome with respect to rights - appear to subvert the reasons for obeying the rules in this case.

Against this, we can point out that an agent cannot know with absolute certainty that this particular act X will lead to the best outcome for reducing rights violations.[48] This problem would be particularly acute in highly complex situations, such as armed conflict. If direct consequentialist reasoning applied to each case would be inadequate for the task,[49] then one cannot know which rule-breaking acts would lead to a better outcome than sticking with the policy of following the rules. So a commitment to the best outcome for the core value cannot lead to a permission or obligation to act against the rules in particular cases if one cannot know which are the relevant cases.

Moreover the agent can reasonably predict that if all other agents followed this line of direct consequentialist reasoning, it would lead to chaos. Each agent can reach the conclusion that all the other agents ought to follow the rules. So he ought to follow the rules.[50] Hence the purpose and moral grounds of the rules – the best outcome with respect to rights violations - would recommend that the agent follows the rules even in cases where alternative actions which break the rules appear *prima facie* to better fit the purpose and moral grounds. The rule-consequential formulation is not subverted by its moral grounds – the best outcome regarding

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[48] See for example J. Lenman, "Consequentialism and Cluelessness," *Philosophy and Public Affairs* 29(4) (2000): 342-370.

[49] See for example Haslett, quoted in Hooker (2000) p. 143. Also, see J. McMahan, "The Morality of War and the Law of War," In *Just and Unjust Warriors,* eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 41: '[T]he presumption is against violation [of the law] and combatants should be reluctant to give their individual judgment priority over the law, for the law has been designed in part precisely to obviate the need for resort to individual moral judgment in conditions that are highly unconducive to rational reflection.'

[50] I should signpost that below, I will relax that constraint.

violations; reflection on human fallibility, the complexity of the real world and the thought that public rule-breaking could undermine the authority of rules supports the non-interference of direct consequentialist reasoning. This can be summed up – the moral grounds give reasons for following the rules in this situation.[51]

However, the objection can be pressed, surely there will be cases where even after factoring in the chance that an agent may be mistaken about their own competence and may have wrongly estimated the facts, the result of sticking to the rules can reasonably be predicted to be catastrophic and the only foreseeable way of avoiding this is to break the rules. Here we have a range of cases that include the 'supreme emergency'.

In 'supreme emergency', it may well be the case that the moral grounds will give strong reasons for acting contrary to the rules. Since, so the argument goes, the proposed moral justification of the rules is that adherence to these rules leads to the best outcome with respect to rights violations, then if in a particular case the only way to avoid massive negative outcome for those values would be to act not in accord with the rules, this would be the morally justified action. So it appears that rules that do not include 'supreme emergency' exemptions are not morally defensible on those grounds that are supposed to justify them,[52] and the rules *therefore ought to include such exemptions.*[53] Hence the rule-consequentialist account would at least in part collapse into direct application of a principle of acting with the aim of bringing about the best outcome for minimising rights violations,

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[51] See for example J. Raz, "Authority and Justification" in *Authority,* ed. J. Raz (New York: New York University Press, 1990), 136 and 139.
[52] See for example D. Lyons, 'Utility and Rights', in *Theories of Rights,* ed. J. Waldron (Oxford: OUP, 1984), 110-136.
[53] We do not need to claim that parties facing a 'supreme emergency' would be exempt from all laws concerning conduct in conflict. Rather, for example, that the prohibition on targeting civilians does not apply to them but the requirements of necessity and proportionality do still apply.

where agents judge whether or not they are facing a situation of 'supreme emergency'.

However, the consequences of embodying such an exception would be predictable; agents claiming 'supreme emergency' whenever such action could be advantageous to them.[54] These need not be insincere claims. They could be the result of human psychological capability of self-deceit. On the other hand, if there were no exemption, agents could still claim 'supreme emergency' to explain why they are prepared to break the rules. The fact that they still have to break the rules with the prospect of facing penalties would be a disincentive so to do, except when they genuinely believe it to be necessary.[55] These are reasons for thinking that the moral grounds of the rules would recommend that those rules ought not to recognise such extreme cases, and ought not to include 'supreme emergency' exceptions. This does not require any special or unique claim regarding the rules governing armed conflict. Domestic traffic rules do not include some (*prima facie* morally justifiable) emergency exemptions such as, for example a permission to drive your car through a red light when taking an injured person to the hospital accident and emergency department.

The notorious Alan Dershowitz[56] argument for a torture permission to be embodied in the law might be a good example here. His argument is that torture can be justified on consequentialist grounds in specific cases such as the 'ticking

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[54] Though I note the contrary claim by Bellamy, that even when the RAF might (arguably) have claimed a supreme emergency justification for bombing German cities, they chose instead to class the civilian deaths as collateral harms from attacking military targets. A.J. Bellamy, "The Ethics of Terror Bombing: Beyond Supreme Emergency," *Journal of Military Ethics* 7(1) (2008): 59.

[55] A judgment that any such action is justified by a supreme emergency ought also to take into account the compliance effect, of undermining the viability of the law. Realistically, agents would be likely to discount this effect and weight more strongly their community's survival, which is a further reason not to build in supreme emergency exemptions.

[56] Antony Lamb "Torture and the Ticking Bomb," review of *Torture and the Ticking Bomb* by Bob Brecher, *Philosophical Frontiers* 3(2) (2008): 150.

bomb' scenario. Since officials ought to torture in these circumstances, and agents of the state do in fact torture when they believe that it could avert great harm, the process ought to be legally regulated, he argues. However, my claim here is that even if it were admitted that torture would have this consequentialist justification in the hypothetical scenario, consideration of consequences could nonetheless count against embodying a torture permission in law. We could predict officials erroneously believing themselves to be facing the 'ticking bomb' scenario and warrants being issued to permit the torture of their prisoner.

Sinnott-Armstrong sums up the point well:

> 'A consequentialist theory of the deep morality of war can admit that public rules of war should be formulated in deontological terms. Such public rules might have better consequences because actual agents would make too many mistakes an applying public rules formulated directly in terms of consequences'.[57]

In sum, the rules would not be inadequate (or the proposed grounds for justification wrong) if some particular acts that we believed would give best results for minimising rights violations were prohibited by the public laws of war. Also, the reason for following the rules - the appeal to consequences - would not recommend calculating whether rules ought to be broken in specific cases, so would not undermine rule-following. And, the rule-consequential formulation would not necessarily require 'supreme emergency' exemptions embodied in the rules.

There now appears to be a contradiction between my claim that direct consequentialist reasoning regarding individual acts ought not to interfere with the rules because of (my insistence on) the difficulty of assessing consequences, and the claim that a set of rules can be justified by appeal to the consequences.

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[57] Op. cit. p 204. Rules including 'supreme emergency' exemptions would require agents to engage in direct consequentialist reasoning, as they have to decide whether the situation they face is a 'supreme emergency'.

However, there is an important difference. As I argued above, unlike theories that are committed to the challenge of predicting future consequences of a particular act, rule-based accounts can judge the justifiability of rules with a backward-looking assessment of the effect of those rules. Together with limiting ourselves to certain core values, this would at least make it possible that over time the rules can be revised to improve the outcome with respect to those values.

Moral and Practical Problems with Developing New Rules.

The need to appeal to the effect of the rules as evidence for the justifiability of them can lead to problems with formulating new rules. So suppose, as I am claiming, that laws governing conduct in war are justified by appeal to the consequences of those rules.[58] The value V, for which these rules aim to achieve the best outcome, has been interpreted as the reduction of rights violations. (The following argument does not turn on that interpretation; it is equally applicable to minimising harm, or harm to innocents.)

The current state of the laws governing war is the result of the refining of rules of conduct over hundreds of years, learning from the lessons of history; from the misery, suffering and death of millions. The effectiveness of new rules will be an empirical matter; sometimes but not always they will achieve their aim. But conducting experiments with new rules to determine which will achieve the best outcome, and which will not, would be a procedure difficult to defend. It may foreseeably incur unacceptable cost in terms of the core value of the proposed

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[58]Rodin 2007, p 149.

justification, whether that be interpreted as the reduction of either suffering, or rights violations, or harm to innocents, caused in war.

We can draw this up as a general problem for appeals to consequences to justify bodies of rules. For a given set of rules there may be some better set of rules that would be epistemologically accessible. That is, we could experiment with new rules until a better set is found. However, if conducting those experiments would involve unacceptable moral cost, then there is no morally acceptable way of gaining knowledge of those improved rules. The better set of rules is not morally accessible.

This is not to say that the current rules can never be improved upon. We can give reasoned argument for amendments, and after some trial, drop them if they prove counter-productive. However, I am suggesting here that there may not be a morally acceptable path to the optimal rules by this process of tinkering, and the cost of transition by tearing-up the rules and starting again could also be unacceptably high.

Note that this is a different problem from that which motivated the move from C2 to C3 above.[59] There, the problem was that we think the rules could be improved, but we just don't know what those improvements are. Here, the problem is that we think there are ways of finding out what those improvements are, but those ways would involve morally unacceptable cost. Note also that the possibility of some epistemologically accessible better set of rules would not present a problem if C4[60]

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[59] pp 32-35 above.
[60] p 36.

were the justifying principle, claiming merely that the current laws are 'good enough'.

So, suppose it is claimed that a set of rules R is morally justified by the consequences of those rules – a principle something like C3. And suppose it is believed that a better set of rules S (that is, rules that would lead to better consequences, with respect to the core values) could be epistemologically but not morally accessible. Ought we to conclude that rules R are not morally justified, because of the possibility of the alternative set of rules S that would better achieve the aim of the rules?

The possibility of some better set of rules S does not give grounds for rejecting rules R if the content of S cannot (morally) be accessed. We cannot be morally required to do something (reject R and conduct the experiments necessary to develop S) that we ought not to do.[61] However this still leaves the real problem of how to develop rules that better achieve the aim of the best outcome with respect to the core values. For the laws of conduct in war, that is the problem of how to develop rules that better achieve the aim of the best outcome with respect to suffering, or rights violations,[62] or harm to innocents, caused in war.

I have called the tensions between permissions (that is, lack of prohibitions) in the current rules, the moral grounds of those rules, and the need to secure agreement

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[61] If the research were undertaken to develop S, and if those optimal rules were successfully arrived at, and if the future benefits of S outweighed the harms caused in development, then a backward-looking consequentialist assessment might judge the process to be justified. However, making a forward-looking assessment, as would be the case when attempting to justify embarking on the process, is a different matter. There would be no guarantee that S would be developed, and reasons to believe that it would not. For example, the process of allowing a 'test-run' of rules the next time war breaks out would have dubious value because agents would act in the knowledge that the rules are being tested, rather than acting how they actually would act if the rules were established. We could run harmless experiments in a simulation, but similar problems may arise.
[62] The value that I have argued for above.

on new rules, the 'new rule problem'. The new rule problem can arise, for example, when changes in technology facilitate the development of new weapons.

So, suppose some new type of weapon W is invented that Party P thinks ought to be prohibited but, as yet, there is no legal prohibition of W (because the weapon was not banned by existing legislation, and new legislation concerning this particular weapon has not yet been passed). Is P under a moral obligation not to use W; what is morally binding on P now? There will be a tension between on the one hand:

(i) Agents ought not to allow direct consequentialist reasoning regarding achieving the best outcome with regard to preventing rights violations to interfere with compliance with the rules. There is a moral requirement to follow the rules. Since the new weapon is not against the rules, there is no moral requirement to refrain from its use, until new agreement on the rules is secured. And on the other hand:

(ii) The laws of war include provision for the incompleteness of treaty law. Protocol 1 Article 1(2) states:

> 'In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.[63]

Since use of W is (*ex hypothesi*) a case not covered by existing agreements, Protocol 1(2) applies. Suppose there is no customary practice with relevance to use of W; then, its use should be judged by 'principles of humanity' and / or

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[63] A. Roberts and R. Guelff, eds. *Documents on the Laws of War* (Oxford: OUP, 2000), 423. For parties that have not ratified this treaty, this principle could be asserted as customary international law.

'dictates of public conscience'.[64] P believes that W ought not to be deployed as its use is contrary to the aims underpinning the laws of war – the purpose of achieving the best outcome with respect to the prevention of rights violations that are considered contrary to elementary considerations of humanity. This is a reason for P not to use W. Against this it can be said:

(iii) This kind of appeal to direct consequentialist reasoning in complex situations is inadequate and inconclusive. For instance:

(iv) Presumably there would be some military advantage gained by use of W, otherwise there would be no point in its use. If the advantage W would give P meant that the war would finish sooner than it would otherwise, then it may be that use of W would in fact achieve the best outcome with respect to reducing violations.[65] If this were so, then the moral grounds of the rules would require P to use W.

(v) Furthermore, a unilateral decision by P not to use W could jeopardise the possibility of reaching agreement on a ban, since other parties may no longer feel the need to agree to a ban on W if P would not use it against them.[66]

But of course the argument in (iii) against the type of direct consequentialist reasoning used in (ii) would also count against the arguments in (iv) and (v). Probably there can be no hard and fast rule here, with judgments having to be made on a case-by-case basis. A conscientious power could adopt the following

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[64] See Appendix 2 below for the argument for the independent rather than cumulative interpretation of these principles.
[65] I am not claiming this would necessarily be the case; I am recognising it as a possibility.
[66] And presumably a ban on W would be a desirable state of affairs.

rule of thumb: assume the use of, or the threat to use, any new weapon is not justifiable on moral grounds, and require arguments to show that its use is consistent with principles of humanity before it is deployed.[67]

These tensions can be stated in a general form. Suppose we believe that some newly possible or previously unconsidered act A ought to be prohibited by set of rules R (because it would lead to a bad outcome with respect to V), but is not; so the rules need revising. Furthermore, suppose some agent believes that doing A would be advantageous to them, so there is a reason for them to A. Since we should follow the rules (because, I have argued, we should not allow direct consequentialist reasoning to interfere with rule-following) and A is not prohibited by the rules, consideration of the rules gives no reason not to do A. On the other hand, A is considered to be *prima facie* wrong, and this is a reason not to A. Against this, unilaterally refraining from doing A could jeopardise the possibility of securing (morally desirable) new rules prohibiting A.

A second type of example can arise when parties engaging in armed conflict are unlike those anticipated and reflected in the laws of war.[68] Some collectives that are parties to conflict are not armies of nation-states whose political leaders are recognised as having rightful authority to resort to armed force; possible examples are Tamil Tigers and Farc. And in some conflicts persons who use armed force do not meet the agreed requirements for being legitimate combatants; many

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[67] The task of deciding what counts as a new weapon could be assigned to some sort of independent tribunal. An obvious candidate would be the ICRC. See for example P. W. Singer, *Wired for War: The Robotics Revolution and Conflict in the 21st Century* (New York: Penguin books, 2009), 384.

[68] This could be a consequence of the changing character of war. The paradigm of declared war between states gives way to undeclared state-state conflict, internal conflict, national liberation and guerrilla struggle, and conflict between clans or warlords where the armed forces are as much like mafias as armies. See David Luban: "Preventive War and Human Rights," in *Preemption: Military Action and Moral Justification*, ed. H. Shue and D. Rodin (Oxford: Oxford University Press, 2007), 182.

insurgencies would fall into this category.[69] This situation can also arise because many collectives engaged in conflict are not parties to any agreement on conduct in war.

According to Geneva Convention 1 Article 2, the Convention applies to cases of war or other armed conflict between contracting parties, between contracting parties in their mutual relations even when another Power in the conflict is not a contracting party, and to relations with a Power that has not contracted provided that Power accepts and applies the provisions of the Convention. So the Convention does not apply to armed conflict between a contracting party and a Power that does not accept and apply the provisions, or between Powers that are not contracting parties.[70]

Some of these cases will be covered in international law by Protocol 2, which applies to armed conflict between the armed forces of a Contracting Party and 'dissident armed forces or other organised armed groups... under responsible command'[71] in the territory of the Contracting Party. Where this is not the case (for example, if the conflict is not in the territory of the Contracting Party) Protocol 1 Article 1(2) applies.[72]

Israeli use of force in Lebanon in 2006 is an example of conventional armed forces on foreign territory, in conflict with an unconventional organised armed group.

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[69] I will return to this in detail in Chapter 4.
[70] As the Geneva Conventions have been universally ratified by states, this situation could currently arise only in the context of non-state parties.
[71] Roberts and Guelff, op. cit. p 484.
[72] Cited on p 70 above. For non-contracting parties this principle could still apply as customary international law.

If current moral problems in armed conflict are novel situations, then appeal to established custom may not be fruitful. But it is evident from Protocol 1 Art. 1(2) that the laws of war take armed conflict to be an activity that ought to be constrained by permissions and prohibitions (principles of humanity and from the dictates of public conscience) even when those constraints are not specified in law or established in custom. How do we determine the substance of those constraints? Allowing the public conscience to dictate permissible and prohibited actions in conditions of armed conflict would be fraught with dangers, and is a problematic method for deriving moral principles. If this method is rejected for these reasons then according to the laws we are to fall back on 'the principles of humanity' in these cases.

I have argued above that a plausible interpretation of the principle underlying the international laws of war is that they are prohibitions and permissions for the purpose of minimising rights violations. The moral grounds of those rules is that they are reasonably considered to be the best set of rules currently available for reducing rights violations. So in cases not specifically legislated for in international agreements, decision makers (from individual combatants to military and political leaders) could be left to fall back onto the underlying moral grounds – the principle of aiming at the best consequences with respect to rights violations. That is, they would have to weigh up and reach conclusions on permissible actions on the basis of whether they judge them to be the best actions consistent with the goal of minimising violations.

Given what I have said about epistemological limitations, direct consequentialist reasoning would not be a reliable method for limiting rights violations. But then if hitherto unpredicted situations become foreseeable or more frequently

encountered, rules governing conduct could be altered in response. The moral grounds of constraints on conduct in war, as argued for here, would require extending the scope of those rules to cases not yet specifically legislated for, when those cases become foreseeable.

If this is correct, my rule-consequentialism principle that morally grounds the laws of conduct in war can inform how those public rules ought to deal with new problems arising in current conditions of armed conflict. If the current state of the tradition is no longer thought to be the best set of rules for reducing rights violations, then changes to rules ought to have the aim of achieving the end of minimising rights violations. And if new conditions of conflict lie outside the scope of application of the current rules, and these conditions are commonly encountered, then rules with the aim of minimising violations of human rights ought to be extended to apply to these novel conditions.

The 'Incomplete Rules Problem'.

I suggested above that agents could adopt (impose on themselves) the rule that they ought not to A unless a positive judgment that A is justifiable can be reached. And given our central concern with minimising the violations of certain rights, it seems right to say that A's justifiability ought to be judged according to the consequences regarding those rights violations. However, the need to appeal to direct consequentialist reasoning (DCR) in cases not covered by the existing rules raises a serious challenge to the account of the justification of rules by appeal to consequences given here.

Earlier I argued that exemptions from rules (such as the prohibition on targeting civilians) ought not to be allowed even when, on this particular occasion, it is

believed that the action would lead to a better outcome regarding preventing rights violations; and there is no moral permission to act contrary to those rules (except perhaps in the case of 'supreme emergency'). The argument that our reasons for following the rules would not be subverted by the moral grounds of the rules relied in part on the argument that DCR ought not to be allowed to interfere with rule-following. This was because our efforts to calculate the costs and benefits in any given case could be hopelessly inadequate, and at the same time we can reasonably foresee that incorporating in the rules the possibility of appeal to such a permission would lead to widespread appeal to the exemption, and chaos. These problems would be particularly acute in highly complex and high-stake scenarios such as war.

The account of a consequentialist justification of rules now appears to have reached a problem: if DCR is to give guidance where rules are incomplete or inadequate then it would appear that we are admitting the effectiveness of DCR. But that would weaken my argument that DCR ought not to interfere with rule-following, because that relied on the claims of its inadequacy. If on the other hand we maintain the inadequacy and potential hazards of DCR, then there appears to be no adequate guidance where the rules do not apply.

Hart argues that there is a sense in which all rules are incomplete:

> 'Whichever device, precedent or legislation, is chosen for the communication of standards of behaviour, these, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate; they will have what has been termed an *open texture*.'[73]

If this is right the problem of incomplete rules is going to be deep-seated, pervading all the rules governing conduct in war. But the issue that Hart is

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[73] H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 124.

highlighting is different to the one I present here. For him, the problem is that each rule, however clear-cut on paradigm cases, will stand in need of interpretation on peripheral cases. My point is that when it is deemed that the case lies outside the remit of current rules, agents will have to resort to DCR.

However, admitting the need to appeal to DCR where rules are lacking does not necessarily endorse it as an effective action-governing moral principle generally in armed conflict; perhaps it is just better than nothing in conditions of last resort.

Compliance Problem 2 – What You Can Do When Others Break the Law.

The problem of appealing to forward-looking DCR does not only arise where rules are inadequate or incomplete. In conditions of non-compliance, the question of whether agents ought to stick to the rules when others do not do so can involve a need for agents to predict the consequences.

Where the demands[74] on an agent resulting from others breaking the rules would be low (the agent would not be harmed much, or not harmed at all, by the rule-breaking of others), perhaps the presumption should be to stick to the rules. For example, suppose an armed force does not bear a fixed and distinctive emblem, but otherwise complies with all the requirements of being a legitimate combatant (wears uniform, bears arms openly, and otherwise conducts their operations in accordance with the laws and customs of war[75]). This does not seem to place a high demand on other combatants, such to warrant a (moral) permission to break the law.

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[74] The two types of demand for an agent here differ from active and passive demands as discussed by L. B. Murphy, *Moral Demands in Nonideal Theory* (Oxford: Oxford University Press, 2000), 47 – 50, as for him they are the demands resulting from compliance.

[75] And it is not the case that, due to the nature of the hostilities, they are unable to properly distinguish themselves, so Protocol 1 Article 44 does not apply (see p 104).

Where the demands are high, we can distinguish between cases where the cost for the agent from sticking to the rules would be low, and cases where the cost would be high. In the former case, perhaps the presumption should be to stick to the rules. Consider a regular army that faces an irregular force whose only effective means of inflicting harm is to deliver poison darts via a blow-pipe (hence a form of chemical or biological tactic, prohibited in the rules[76]). The demand on the regular troops is high, since the lawbreaking makes the difference between some and no casualties. I am supposing though in this example that the cost of sticking to the rules would be low for the regular force – they would not have anything to gain by breaking the rules, even in the face of lawbreaking by others.

What about when the cost would be high? Say, when a regular army employs chemical or biological weapons,[77] and the only way to counter this is to do the same in return – supposing conventional weapons would be an ineffective response in this scenario. In this situation of high demand resulting from the non-compliance of others plus high cost of compliance, a further relevant consideration would be the cost to others of the agent's non-compliance. The greater the cost, perhaps the stronger the presumption should be to stick to the rules.[78] A pertinent case might be the use of a human shield to 'defend' some artillery. High demand because the use of a 'shield' allows the lawbreaker to cause greater casualties than they otherwise would (perhaps because they can site the artillery closer to

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[76] See for example the 1925 Geneva Protocol prohibiting bacteriological methods of warfare. Roberts and Guelff p 155.

[77] McMahan claims that when one side uses a prohibited weapon such as poison gas the other side may have no reason to obey the prohibition, except to encourage the offending side to cease its violations of the rules. J. McMahan, op. cit. p 35. We could include nuclear here in the class of prohibited weapons – much has been written on that subject.

[78] Other relevant worries might be if the cost of this agent's non-compliance falls on persons other than the original rule-breaker, and if the other persons' rule-breaking is not the cause of the demands on this agent.

the enemy); high cost of compliance because the artillery's target could return fire and cease the attack, but by sticking to the rules and not returning fire (or taking more time and risk by sending in special forces), they suffer greater losses. But, reciprocating with an act of non-compliance (attacking the artillery knowing there would be a disproportionate loss of innocent life) would result in high cost to others (the human shield). I think that concern for the core value of minimising violations would recommend that they should stick to the laws in this case.

But if the cost to others were low, it seems that there ought to be a moral permission to act contrary to the norms (or an exception in the rules, so that the act is not rule-breaking). The justification for this is that others have made it the case that the conditions under which following the rules lead to the best consequences no longer obtain. Furthermore, it may be that the moral permissibility of 'tit-for-tat' law-breaking exemptions involving use of force against combatants could be argued for on grounds of reducing rights violations, if the threat of such a response could prevent the breach of law in the first place.[79]

The upshot of this is that the question of what agents ought to do when others are breaking the rules would depend at least in part on the consequences. And I have argued above that in situations of complexity and high stakes, agents' ability to evaluate consequences is unreliable and is liable to abuse (either intentional, or unintentional through our capacity for self-deceit). A relevant example here could be where regular army units have to evaluate the consequences of attacking non-uniformed combatants who are intentionally hiding amongst a civilian population. Nonetheless, it may be possible to identify certain rules that are especially

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[79] There is a finer-grained distinction to be made here between the moral permissibility of the threat, and of carrying out the threat.

important in protecting against rights violations, and have a further rule (or a 'meta-rule') that non-compliance by others does not give permission to break these rules. A prohibition on targeting noncombatants in armed conflict, and the use of torture, may be examples of those laws that are not subject to reciprocity.[80]

However, this is still not satisfactory. The existence of such a meta-rule carries with it the implication that other rules can be broken when compliance is not reciprocal, and I have argued that such permissions established in the rules are liable to abuse. If on the other hand there is no meta-rule, then (as was the case with 'supreme emergency') agents are left to fall back on direct consequentialist reasoning to judge when they would be justified in breaking the rules (and face the possible consequences). Neither option is a particularly satisfactory solution.

Unjust Rules: The Independence and Symmetry Theses; Civilian Immunity.

The final issue I address in this chapter is the divergence between the 'deep morality' of war, and the 'independence' and 'symmetry' theses as they are embodied in the public rules. Rodin[81] gives the following definitions:

The Symmetry Thesis: 'the same *jus in bello* rights and obligations are held by combatants on both sides of any conflict.'

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[80] I tentatively suggest that the distinction between reciprocal and non-reciprocal rules, in cases of rule-breaking by one party, can be made by appeal to the moral grounds of the rule. Where a rule directly concerns violations of elementary considerations of humanity (such as the prohibition on targeting noncombatants), it is not subject to reciprocity. Where a rule is more of a conventional right or obligation (such as the requirement to have a fixed distinctive emblem recognizable at a distance) the observance of which contributes to the fundamental aim of optimising the violation of certain rights then it may be a rule that binds only when reciprocated.

[81] D. Rodin, "The Moral Inequality of Soldiers: Why *Jus in Bello* Asymmetry is Half Right," in *Just and Unjust Warriors*, ed. D. Rodin and H. Shue (Oxford: OUP, 2008), 44. He introduces these as subjects for evaluation rather than as an endorsement.

The Independence Thesis: 'the *ad bellum* status of the war in which a combatant fights does not affect his or her *jus in bello* rights and obligations (in other words, *jus in bello* is independent of *jus ad bellum*).'

These propositions are reflected in international law by the equal treatment of combatants in the norms governing conduct in combat, without reference to *jus ad bellum* status.[82]

Now, a group of volunteer soldiers who knowingly engage in an act of unprovoked aggression (such as invading the territory of a neighbouring state) are engaged in a collective act that is simply wrong (the invasion). They are also, considered individually, engaged in individual (morally) wrongful acts (killing persons of the target state). So surely all harms committed by them are (morally) wrong. Conversely, soldiers defending against them are not doing anything morally wrong.[83] There is therefore a clear divergence between this moral analysis of combatants and the public rules governing conduct in war.

Furthermore, public rules grant immunity from attack to all civilians regardless of their culpability with respect to unjustified harm. Continuing my example, suppose that the civilian citizens of the aggressor state knowingly voted for this war and continue to give it material support. In the public rules, however, they would continue to enjoy the same civilian immunity as the innocent (*ex hypothesi*) civilians of the target state.

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[82] Though in Chapter 4 (page 104n.) I will indicate a possible exception to this general claim.
[83] Provided that they do not violate *jus in bello* constraints. The distinctions between acts of collectives and those of individuals, and the question of rightful self-defence, will be addressed in Chapter 6. Issues concerning collective responsibility are discussed in Chapter 4. Here, I merely want to draw out the intuition that aggressors do wrong and defenders do not, yet they are both treated the same in law.

So granting equal combatant rights regardless of *jus ad bellum* status and equal civilian immunity regardless of culpability seem to be simply unjust. Moreover, if those public rules are supported by my consequentialist formulation but the comparison with the 'deep morality' casts doubt on the moral justifiability of the those rules, then this draws into question whether that formulation ought to be appealed to as the moral principle underpinning laws.

One response to this is something like that proposed by McMahan - recognising 'two levels' of rules.[84] First, we recognise the 'deep morality' of war, as represented by the moral analyses just given. But then we consider what public rules would best protect those rights that people have according to that analysis (or at least minimise their violation). If mirroring those rights in public rules would be less effective than rules that treated combatants symmetrically, then we recognise that the rules we ought to adopt are the latter; they are recommended on pragmatic grounds.

However, Shue[85] challenges the idea of two levels of rules - those recognised in the 'deep morality' competing with those embodied in the pragmatic public rules. If the latter are morally preferable, then the former (rules mirroring the deep morality) are not a competing conception of rules that ought to apply - they are merely a suboptimal alternative set of rules.

If public rules embodying the symmetry and independence theses and immunity for all civilians are optimal rules regarding reducing rights violations, then they are

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[84] McMahan, op. cit..
[85] Shue, op. cit.

the rules recommended by my rule-consequentialist formulation. In Chapter 4, I explore these ideas in more detail; I set out arguments concerning the moral status of persons who are the subject matter of laws governing conduct in conflict, and how rights violations might best be minimised by public rules.

4. NONCOMBATANT IMMUNITY, NON-UNIFORMED COMBATANTS AND ILLEGITIMATE COMBATANTS.

I have argued that the public rules governing conduct in conflict are justified insofar as they lead to optimal outcomes regarding the prevention of the violation of certain rights - characterising this as a consequentialism of negative duties. Now, the current public rules embody the symmetry and equality theses regarding combatant and noncombatant rights and liabilities; those rules therefore seem (at first sight) to be unjust in treating aggressor and defender alike. In this chapter I will analyse the moral status of persons regarding these issues in more detail, and consider how their rights are best protected in public rules. First, I will argue for public rules embodying full immunity for all noncombatants.[1] In the second half of the chapter I argue that public rules ought to embody symmetrical liability, rights and obligations for all combatants.[2] Insofar as my argument endorses the symmetry and independence theses, it is a justification of current public rules. However, while I support the binary conception of the combatant/noncombatant distinction, I argue for a new interpretation in the rules. Specifically, how this distinction is made in the public rules ought to depend on whether we are considering rules regarding legitimate targets, or rules concerning combatant rights such as POW status.

The Traditional View of Immunity and Liability to Attack.

A central part of the Just War tradition, as expressed for example by Michael Walzer, is the principle of discrimination: combatants are legitimate targets for attack, while noncombatants are not legitimate targets; intentionally targeting

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[1] The first section of this chapter is adapted from Antony Lamb, "War, Proportionality, and Noncombatant Immunity," *Quest* 5 (2007): 60 – 73.

[2] While Finlay says that 'It isn't necessary to accept Mavrodes' argument that non-combatant immunity is convention-dependent to agree that combatant liability is' (C.J. Finlay, "Legitimacy and Non-State Political Violence," *The Journal of Political Philosophy* 18(3) (2010): 299), I will argue that symmetrical conceptions of both noncombatant immunity and combatant liability are convention-dependent.

noncombatants cannot be a permissible act of war.[3] This is expressed by saying that noncombatants have immunity from attack, while combatants do not have immunity. The reason why combatants do not have immunity - why targeting them for attack can be permissible - is that they are threats of harm.

Now, in war, actions targeting combatants will often foreseeably cause collateral harms to noncombatants. For example, suppose the only way to neutralise a crucial enemy military target is to fire artillery shells at it, but this will foreseeably kill some noncombatants. This is a case of foreseeable harms to those who, according to the discrimination constraint, have immunity from attack.

The traditional Just War view does permit such actions. If (i) attacking the military target without any collateral loss of noncombatant life would be justified, (ii) the loss of noncombatant life is unintended and unavoidable, and (iii) the military benefits of attacking the target are sufficiently high to warrant the loss of noncombatant life, the action is permissible.[4]

Note now what it means to have immunity. You are not permitted to target noncombatants for attack. But immunity does not absolutely prohibit all actions that cause them foreseeable harm. Under certain conditions it can be permissible to cause foreseeable harm to those who have immunity from attack.

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[3] M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 3rd edn. 2002), 43.

[4] An action would be considered indiscriminate if it 'may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated'. Geneva Convention Additional Protocol 1 Article 51(5). A. Roberts and R. Guelff, eds *Documents on the Laws of War* (Oxford: OUP, 2000), 449.

A Failure of the Traditional View.

The Just War tradition takes immunity to be a binary concept; you either have it, or you don't.[5] However, there are reasons from a moral point of view to make more 'fine-grained' distinctions.

This problem is brought out by the following example. Suppose a neighbouring democratic state launches an unprovoked armed invasion of the territory of your state, in order to expand their empire. You realise that killing the military leaders of this country would stop the invasion and the war. You identify only three opportunities to kill them by launching a long-range high-explosive missile; each opportunity you think will be equally successful:

Opportunity one, **O1**, when the leaders are amongst a group of soldiers who have volunteered in order to take part in this war.

Opportunity two, **O2**, when they are addressing a political rally of noncombatants who have voted in favour of war.

Opportunity three, **O3**, when they are addressing a rally of dissenters who engage in political activities (acts of civil disobedience) with the aim of stopping the war.

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[5] Perabo refers to this as 'light-switch immunity'. B. Perabo, "The Proportionate Treatment of Enemy Subjects: A Reformulation of the Principle of Discrimination," *Journal of Military Ethics* 7(2) 2008): 141. Perabo's paper argues that discrimination is scalar (see my immunity continuum below) both morally (couched in terms of 'guilt') and in US Rules of Engagement, and ought to be considered so in other public rules concerning conduct in war. This contrasts with my argument - I will argue that a binary view ought to be maintained in public rules (but the combatant/noncombatant distinction ought to fall in different places depending on context).

However, you foresee that the missile will also kill anyone in the vicinity. In each case, the same number of persons would die as collateral harm.[6] Which should you choose?

On the traditional Just War view, since O2 and O3 would kill equal numbers of people who have immunity from attack with the same beneficial result, then other things being equal, according to the binary view O2 and O3 would be equally defensible in considerations of proportionality. But this is not right; O2 is clearly more easily justifiable than O3.

We could modify the principle of discrimination, and claim that the war supporters' moral non-innocence entails their no longer having immunity from attack, so making O2 the preferred choice of these two.

But now, other things equal, O1 and O2 would be equally permissible (they kill equal numbers of persons who do not have immunity from attack, with the same beneficial result). But O1 is, I think, more easily justifiable than O2.

The binary view cannot account for these intuitions (the 'justifiability' orderings). However, drawing on an idea of McMahan concerning the deeper morality of war, we have the theoretical resources to explain these judgments.

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[6] My thought experiment holds the numbers of people the same, in order to draw out some intuitions on the cases. Where numbers are not the same, there may still be some clear intuitions, such as when O2 would kill many thousands of civilians and O3 would kill one. However, in many cases where numbers are not the same, we ought to recognise a degree of incommensurability and indeterminacy. This will be problematic when trying to establish practical action-governing rules - rules of engagement - from these theoretical grounds.

Culpability and Weakened Immunity.

We need to take a closer look at the link between moral culpability and loss of immunity.

I take as a starting point the fundamental intuitive idea that persons have a right not to be attacked, and other persons have a corresponding duty not to attack them. SInce there is the possibility of a broad consensus on this right and correlative duty as a principle on which a range of comprehensive doctrines can converge,[7] this is a good departure point from which we can proceed. Against this background, we can then explain why some persons can be attacked in war.

McMahan[8] presents the following example, which links loss of immunity not to one's status as a threat of harm, but rather, to moral non-innocence or culpability.

> A group of your enemies wishes to kill you. They kidnap at random an innocent person, and implant in his brain an electronic device that once programmed and activated will cause him to seek and kill you. Once activated, the enemies need take no further action. When you discover what is happening, and the police do not believe your tale, you seem to have two options to defend yourself; to kill the pursuer, or find your enemies and coerce them to de-activate the implant. The only way to do this is to kill them one by one, until they give in.

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[7] J. Rawls, "The Idea of an Overlapping Consensus," In *John Rawls: Collected Papers,* ed. Samuel Freeman (Cambridge Massachusetts: Harvard University Press, 1999), 421-448.

[8] J. McMahan, "Innocence, Self-Defense and Killing in War," *The Journal of Political Philosophy* 2(3) (1994): 202. Lazar reports that while the culpability view provides valid insights, the application to public rules is problematic. Consequently, McMahan pursues a sustained discussion of agent rather than moral responsibility as a criterion of liability to defensive killing. I retain the culpability view, arguing that we can derive plausible public rules from this approach. S. Lazar, "Responsibility, Risk, and Killing in Self-Defense," *Ethics* 119 (2009): 701-702.

The point of this story is that according to the traditional Just War view, the programmed pursuer is threatening harm and so does not have immunity from attack, while the enemies are not threatening harm, so do have immunity.[9] Therefore according to the Just War view, of your possible courses of action it is morally preferable to kill the pursuer.

This, claims McMahan, is implausible.[10] It is clearly morally preferable to kill the non-innocent enemies who are not currently a threat, rather than kill the innocent pursuer who is a current threat. This story gives us reason to think that directly threatening harm is not necessary for moral liability to attack, and that loss of immunity is better linked to moral non-innocence.

However, it is not permissible intentionally to attack all persons who have some moral responsibility for unjustified harms. For example, suppose there were to be some military advantage gained by intentionally targeting the same pro-war voters that we considered in O2 (this time, without the presence of the military leaders). We would not normally consider targeting these civilians to be justifiable.

So we ought to conclude that the civilians have not lost their immunity, as would be the case with soldiers.

But we would also want to say that collateral harms to these voters would be morally more easily justifiable than collateral harms to the dissenters in O3. So the voters' responsibility means they have lost some of their immunity, compared with the dissenters.

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[9] The 'enemies' are the analogue of civilians in war, while the programmed pursuer is the analogue of soldiers who threaten harm but are (morally) innocent.
[10] McMahan 1994, p 203.

We should say that the pro-war voters have weakened immunity. Their responsibility *for unjustified harms* entails weakened but not fully weakened immunity. Just as responsibility is a matter of degree, so is immunity. This contrasts with the traditional Just War view, in which they would be held to have full immunity.[11]

It is worth noting that culpable past actions may be a cause of current unjustified harms where we do not consider the culpable agent morally responsible for those current harms. For example, my act of cruelty to an animal (a blameworthy action) may seriously disturb a watching child who then grows up to be a warlike dictator. I am at fault, and my culpable past action is a contributing cause to unjustified harms. But my blameworthiness lies in the act of cruelty not in the remote unforeseen consequences. The civilian voters, on the other hand, are relevantly at fault because their past actions are a foreseeable contributing cause to current unjustified harms.

Objection: Weakened Immunity Unnecessary to Explain Intuitions.

Taking the binary view, even if we took political support of the war to entail loss of immunity (making collateral harms to the pro-war voters in O2 more easily

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[11] McMahan argues that noncombatants contributing to an unjust war effort can have 'degree[s] of liability' to attack, but their degree of liability would be low. Attacking them is normally ruled out on grounds of immunity, proportionality and necessity (J. McMahan, '"The Ethics of Killing in War," *Ethics* 114 (2004): 719). He also expresses 'degrees of liability' as liability to certain harms, J. McMahan, "The Morality of War and the Law of War," In *Just and Unjust Warriors,* eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 27. McMahan later argues that civilian culpability for unjust war can affect decisions regarding collateral harms, J. McMahan, *Killing in War* (Oxford: Clarendon Press, 2009), 218 – 221. My argument presented here differs from McMahan because I conclude that public rules ought not to permit discounting the value of culpable civilians in proportionality judgments. He also considers civilian liability to lesser harms. Fabre considers liability to lesser harms (such as reparations at the end of war), but concludes that with regards to liability to attack, epistemic considerations recommend considering all civilians as non-liable. While the threshold of causal and moral responsibility for contribution to unjust lethal threat needed to lose liability may be reached by some persons, differentiating these from the rest of the civilian population is impossible. C. Fabre, "Guns, Food, and Liability to Attack." *Ethics* 120 (2009): 63.

justifiable than collateral harms to the dissenters in O3) we could nonetheless take collateral harms to the soldiers in O1 to be even more easily justifiable for some additional reason, such as the soldiers' status as direct threats. So the 'justifiability' ordering O1, O2, O3 is restored without appeal to the concept of 'weakened immunity'. If the binary view can do the work needed of it, the introduction of 'weakened immunity' would be redundant.

Consider now:

> Opportunity two*, **O2***. The missile would kill the military leaders of the aggressor state, but this time they are addressing a rally of the opposition party, all of whom we can assume voted against the war. However, unlike the dissenters in O3, these persons in O2* accept the outcome of the democratic process and continue to enjoy the benefits of their normal everyday lives in this community. The same number of collateral deaths occur as in O2 and O3.

If, on the binary view, the opposition voters in O2* have immunity, then harms to them must be considered according to proportionality constraints on collateral harms. O2* and O3 would result in the same number of deaths of those with immunity, so proportionality considerations would be neutral between them. That is not right. Collateral harms to the opposition voters in O2* are more easily justifiable than collateral harms to the dissenters in O3, on the grounds that the opposition voters share in the community's collective responsibility for the unjust war while the dissenters do not.[12]

[12] I will support this claim below.

However, if according to the binary view, opposition voters in O2* have no immunity, then we should be neutral between O2 and O2*. But I think it is clear that collateral harms to the pro-war voters in O2 are more easily justifiable than collateral harms to the opposition voters in O2* on the grounds that the former culpably voted for the war.

The binary view of immunity does not account for the 'justifiability' ordering of O2, O2*, and O3. Introducing degrees of immunity, linked to moral responsibility with respect to unjustified harms, can account for the ordering. But since the justification of the ordering relies on the claim of 'collective responsibility', we need to say more to substantiate this.

Collective Responsibility and Weakened Immunity.

David Miller[13] addresses the question of whether members of collective entities (such as nations) can be held responsible for harms caused by activities of that collective.[14] The relevant sense of responsibility is 'outcome responsibility': an agent is 'outcome responsible for the consequences of her action'... when 'we are attributing those consequences to her in such a way that, other things being equal, the resulting benefits and burdens should fall to her'.[15]

Miller presents two models of collective action. The first is the 'Like-Minded-Group'. A rampaging mob engages in a destructive riot. Whatever the rioters' individual moral and legal responsibility for damage, the whole mob bears collective responsibility for the effects of the riot, meaning that liability for the cost

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[13] D. Miller, "Holding Nations Responsible," *Ethics* 114 (2004): 240 - 268.
[14] For an alternative account of collective responsibility, Crawford argues that since war is essentially an activity of collectives, responsibility for harms committed by the military can rightly be attributed to the different types of collectives that are involved - military, politicians, and in democracies, citizens. N.C. Crawford, "Individual and Collective Moral Responsibility for Systemic Military Atrocity," *The Journal of Political Philosophy* 15(2) (2007): esp. 198 & 203-206.
[15] Miller p 245.

of repair falls to that group. His second model is the 'Cooperative Practice Model'. Consider an employee-controlled firm in which the work-force vote in order to determine company policy. Suppose the normal working process foreseeably involves some pollution to the environment; all the employees, who share the benefits and have a fair chance to influence policy, must also share burdens. One of those burdens is the cost of cleaning up or compensating for the pollution.

Now, if in these examples members of the collective are held liable for the costs of putting things straight, we ought also to recognise conditions for non-responsibility for practices and policies of groups. In the employee-controlled firm, workers who voted against polluting practices may be judged less morally responsible for that pollution, compared with workers who voted for the practice; but due to their continued benefit they must also share the burdens.

Regarding like-minded-groups, certain cultural values (racism, for example) of a community may encourage some members to cause unjustified harms (lynching). Even if a member of that community does not share the aims of those causing harms, and even where that bad outcome is disapproved of,[16] a person can help to sustain that culture which gives rise to those harms by, say, openly discriminating against certain ethnic groups. Such a member would obviously be less culpable than those doing the lynching, but nonetheless would bear some burden of collective responsibility.

So if persons could reasonably be expected to take further action either to prevent the harmful outcome occurring, or to forego benefits arising from membership of that collective, or to refrain from activities that create or sustain conditions which

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[16] Ibid. p 252.

encourage others to cause unjustified harm, then mere inactivity, voicing opposition and voting against do not relieve an agent of collective responsibility. (I will argue below that what actions we could reasonably expect an agent to take will depend on context.)

Insofar as states create and support protective and welfare services from which members benefit, and members make sacrifices to support a shared culture, again from which they benefit, states can be thought of as cooperative practices. And insofar as collective actions of the state are supported by the shared beliefs and aims of the community we can think of them as a like-minded group.[17][18]

If citizens of a state waging an unjust war fail to take action (that could reasonably be expected of them) to prevent or stop the war, or do not forego the benefits of belonging to that collective, or help to sustain a culture that gives rise to the war, then they share some collective responsibility for unjustified harms.[19] (For any individual these strands of responsibility may reinforce each other, when the individual is blameworthy for two or three of these reasons. Or they may pull in different directions, for example where an individual takes all reasonable steps to expose the moral wrongdoings of their government but continues to benefit from membership of the community.) If that is right, we still need to explain how this

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[17] I will return to the topic of morally relevant collective entities in Chapter 6. There, I will refine this analysis and argue that the 'encompassing group' (p 155), rather than the state, is the relevant entity when evaluating acts of collective self-defence.

[18] An objection to this analysis is the claim that the cooperative practices and like-minded groups described above are voluntary bodies, while states are not. This objection moves too quickly. On the one hand, if states are not voluntary bodies because people do not make a free choice to join and are not free to leave, then the same conception of absence of free choice could apply to many people's lack of choice regarding paid employment (and so their membership of a cooperative practice). On the other hand, if the choice between working or not is considered a genuine free choice despite the hardships that would follow from not having employment, then that same conception of choice could apply to individuals and states.

[19] Lazar claims that "In the modern state, almost everyone contributes to the capacity of our government to act—all the more so in democracies." S. Lazar, "The Responsibility Dilemma for Killing in War: A Review Essay," *Philosophy and Public Affairs* 38(2) (2010): 192.

collective responsibility undermines the original rights-based view of immunity of individuals.

Weakening of immunity is grounded in the individual being at fault.[20] So we can explain a judgment that collateral harms to the opposition voters in O2* are more easily justifiable than collateral harms to the dissenters in O3 in the following way: the opposition voters are morally at fault because they continue to participate in and benefit from the day to day activities of their state which wages an unjust war,[21] and contribute to its culture, while failing to take all reasonable steps to stop those unjustified harms. And this blameworthiness entails the liability of weakened immunity.[22]

Conditions for Non-responsibility.

There are limits and exemptions to this attribution of collective responsibility. First, consider a liberal democracy that is generally considered by its citizens to be a fair society with respect to their opportunity for political, economic and social participation. The leaders of this state then deploy their military in a war which some citizens have good reason to consider unjustified. In these conditions, mere inactivity, voicing opposition or voting against the war do not count as conditions for non-responsibility. But agents opposing the war would escape responsibility if

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[20] Seamus Miller argues that culpability, rather than the narrower conception of responsibility for an action, is the relevant concern. This culpability may derive from being responsible for enforcing a policy that violates rights or in which others violate rights (apartheid), or culpably omitting to (attempt to) prevent or stop violations. He differs from me in that he still considers immunity a binary concept; e.g. 'such civilians might be expected to enjoy civilian immunity in *some* wars'; and p 135 some administrators '... are collectively morally responsible for omissions of a kind that might justify the use of deadly force'. S. Miller, "Civilian Immunity and Collective Responsibility," in *Civilian Immunity in War*, ed. I. Primoratz (OUP: Oxford, 2007), 130.

[21] So considerations of *jus ad bellum* are entering into issues of *jus in bello*. This is contrary to a traditional reading of Just War theory. Later in this chapter I will argue that in the public rules there ought not to be a distinction between those civilians that are blameworthy with respect to an unjust war, and those that are not. Hence, on this issue, the Just War separation of *jus in bello* and *jus ad bellum* is maintained in those rules.

[22] Note Kelsay's claim that Shari'a law recognises weakening of immunity on the grounds of collective responsibility and something like the doctrine of double effect. J. Kelsay, "Arguments Concerning Resistance in Contemporary Islam," in *The Ethics of War*, eds. R. Sorabji and D. Rodin, (Aldershot: Ashgate Publishing, 2006), 61-91.

they did not continue to participate in and benefit from the day-to-day activities of their country. These are very stringent conditions that few would meet, but examples may be those who leave the country in protest.[23] Pogge argues that agents who compensate for unjustified harms perpetrated by their state actually do 'much better by these victims' than they would do by emigrating.[24] So if emigrating entails non-responsibility, then compensating victims should do so too.

Also, we should not attribute collective responsibility to those citizens who take 'all reasonable steps' to stop the unjustified harms. Persons imprisoned following civil disobedience protesting against the war surely meet this condition. (This may be a case of tension between strands of responsibility as discussed above; the detainee foregoing freedom as a result of their protest, but still 'benefiting' from the state through provision of food and shelter.)

If we think such persons have gone beyond the 'all reasonable steps' requirement, then that criterion will bite somewhere between on the one hand merely voting against the government, and imprisonment or emigration on the other. But, we ought not to think of responsibility as a 'binary' concept; there will not be a threshold, but a range of degrees of responsibility. So other things being equal, an agent who engages in civil disobedience (to protest against the war) for which they are imprisoned may be less culpable, because of this action, than an agent taking part in a (foreseeably less effective) protest not expected to incur legal penalties.

Furthermore, within our imagined liberal democracy, what counts as reasonable steps will differ from case to case. An adult, with say three dependent (innocent)

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[23] Then, of course, the question of collateral harms to them would not be relevant.
[24] T. Pogge, "Recognized and Violated by International Law: The Human Rights of the Global Poor," *Leiden Journal of International Law* 18 (2005): 1-25.

children, who engages in civil disobedience puts more at risk compared with an adult with no dependents who takes the same action. Actions which count as 'all reasonable steps' for the former may fall short of that criterion for the latter. So other things being equal, we might judge the former thereby less culpable than the latter.

Attributions of collective responsibility should also take account of non-culpable ignorance. For example, citizens cannot be expected to keep track of each soldier's compliance with laws of war. Also, for many states, conditions for cooperative practice or being a like-minded-group do not hold for everyone. Actual liberal democracies fall short of the ideal state discussed above; they will, for example, often contain disenfranchised groups that could not reasonably be held responsible for the results of political processes from which they are excluded.

Finally, not all states are liberal democracies. Conditions for attributing collective responsibility do not hold for an oppressed minority (or majority), or where a nation lacks self-determination (such as in cases of imperial rule from outside), or where it is governed by despotic or authoritarian internal rule.[25]

In these cases, ceasing to participate in the activities of the nation may be extremely difficult, when for either economic or political reasons leaving the country is not feasible. And while subjects may have a duty to resist wrong actions by such governments, we should recognise limits to this duty. Where political activism entails very serious risk (death) or is simply futile, or both, the 'all reasonable steps' condition may not even require openly voicing opposition to state policy.

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[25] J. Rawls, *The Law of Peoples*, (Cambridge Massachusetts: Harvard University Press, 1999), 94.

Where opposition is violently suppressed and necessarily covert, while it might be right to judge some citizens less responsible than others on account of their fulfilling the 'all reasonable steps' condition, in practice such judgments may be just impossible to make. However, we could still discriminate some degrees of responsibility in such a state; for example, attributing moral responsibility to persons such as members of the government who instigate a war of aggression, professional soldiers in an unjust war, or members of the state's corrupt police force.

I have said that civilian immunity is weakened in virtue of being a member of a like-minded group or a cooperative practice. McMahan[26] argues that immunity ought not to be a function of membership; it is morally repugnant to claim that civilians become more liable to harms simply because they are a member of a particular community. Rather, loss of immunity is a function of what persons actually do. So civilians lose some immunity only if they, for example, put pressure on their government to begin an unjust war, or arouse support for such a war or vote for politicians who promise war.[27] This would seem to suggest that all persons who do not in some way actively support the war are non-culpable. If that were the case, then I would be wrongly attributing weakening of immunity to persons who fail to oppose their government. However, he also argues that civilians can (partially) lose immunity for what they fail to do, such as failing to oppose a government waging unjust war.[28] Since a corollary of this is that citizens retain immunity when they do oppose the government, there is no disagreement between us regarding who retains full immunity and who becomes more liable to collateral harms.

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[26] McMahan 2009, pp 208 – 209.
[27] Ibid. p 214 - 215.
[28] Ibid. p 215.

Immunity Continuum.

When we say that some persons have fully weakened immunity and others have unweakened immunity, that is not equivalent to an absolute permission or prohibition regarding harms to them.

We can think of a continuum of degrees of immunity between the two extremes of absolute prohibition and absolute permission to harm.

Absolute prohibition ---------- Absolute permission

Placing those with unweakened immunity at the extreme of absolute prohibition would mean that there are absolutely no circumstances under which killing them could be morally defensible. If that were the case, given a hard choice between killing persons with weakened immunity or persons with unweakened immunity, killing any number of the former would be preferable to killing one of the latter. That is surely not right. The unweakened immunity of innocent persons places them somewhere towards the left-hand end of this line, but not at the extreme of absolute prohibition. (Is there anyone for whom there would be an absolute prohibition?)

Similarly, the fully weakened immunity of culpable soldiers fighting an unjust cause places them somewhere towards the right-hand end of this continuum, but not at the extreme of absolute permission (that would mean killing any number of them would be morally permissible). Partially weakened immunity places persons somewhere between the two; the greater their culpability, the further right we shift them.

Thus this continuum model can reflect the thoughts that (i) when we claim immunity for morally innocent noncombatants, we are not claiming an absolute prohibition on causing foreseeable harms to them. And (ii) when we claim that culpable combatants do not have immunity, we do not mean that there is an absolute permission to kill any number of them. There could be circumstances in which doing so could be judged not morally defensible, on the grounds of proportionality.

Three Problems with This Account.

I have presented the case for linking immunity and liability to moral blameworthiness rather than solely to being a threat or not, and argued that on this view immunity ought to be held in degrees, rather than simply held or not held. This account of degrees of immunity can explain some judgments of the justifiability of collateral harms. However, there are three reasons for rules governing conflict to retain the traditional binary view.

First, my examples have assumed a homogenous group of noncombatants all with the same degree of immunity. In real-life cases, it is likely that a group of noncombatants would have a range of culpabilities, and so a range of immunities. Also, in many real-life cases such as targeting an arms factory in a populated area, those harmed may include the wholly innocent such as babies and small children.

Second, there is an epistemological problem. Decision makers, either tactical or strategic, could not realistically be expected to know the degrees of culpability of a group of noncombatants. This objection holds for either the imagined homogeneous groups of my examples, or the more realistic mixed group. If they

cannot know the degree of culpability, they cannot make the fine-grained distinction regarding immunity that this revision would require.

Third, while a particular action X may be judged morally justifiable, the consequences of embodying in law a permission to X ought also to be taken into account.[29] A loosening of the constraints on harms to noncombatants could be abused; combatants could wilfully cause disproportionate harm to noncombatants, claiming that these harms are justified by culpability. And the false claim that a group of noncombatants have weakened immunity need not be insincere; it could be the result of human capability for self-deceit where it promotes the agent's interests. Alternatively, the thought that noncombatants might have weakened immunity could lead to an air of negligence regarding the care due to them.

So while the concept of weakened immunity can explain some intuitions regarding the deeper morality of war, these reflections give overriding reasons for norms governing conduct in conflict to treat all noncombatants as having unweakened immunity from attack. Hence the argument identifies a divergence between morally justifiable acts, and acts that from a moral point of view ought to be legally permissible.

Summing up so far, I have considered here two revisions of traditional Just War theory. First, taking immunity to be something held in degrees, rather than simply held or not held (the binary view). This was explained by the second, linking immunity and liability to moral blameworthiness rather than solely to being a threat

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[29] Lazar reports McMahan's view that many noncombatants will be responsible for their country's unjust war, but not morally liable (Lazar 2010 p 203). The argument here is that morally speaking, they ought to retain full immunity in the public rules.

or not. These revisions would impact on proportionality judgments of the moral permissibility of collateral harms.

However, there are good reasons not to embody these 'fine-grained' moral distinctions in laws governing conflict; doing so would foreseeably increase rights violations. So while the theory presented here reflects the 'deeper morality' of war, international law ought to retain the simpler traditional binary view of immunity.[30]

Legitimate, Non-uniformed, and Illegitimate Combatants.

We have seen that from the point of view of moral blameworthiness, the soldier / civilian distinction is too simplistic. I will now argue that it is also too simplistic for determining who is, and who is not, to count as a combatant in the public rules.

We can identify four issues here; first, that public rules governing conflict stipulate conditions for persons to qualify as combatants[31] and possible moral justification of these rules. Second, the fact that some combatants do not meet legitimate combatant conditions and reasons why this can work to their advantage. Thirdly, some considerations regarding the moral permissibility of using armed force without meeting the legitimate combatant requirements; and finally, the issue of targeting non-uniformed combatants. I conclude with some recommendations for

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[30] Margalit and Walzer argue for the same conclusion regarding public rules concerning war; whatever judgment of proportionality applies to one's own noncombatants, applies equally to noncombatants of an enemy state. This is because, they argue, that the combatant / noncombatant distinction is necessary to limit the scope of war, and any erosion of this distinction endangers the Just War aim of limiting war's harms (or on my version - rights violations) and heads towards total war. Yadlin and Kasher reply that they are right to distinguish between noncombatants in territory under their control where no collateral harm is acceptable, and noncombatants in territory not under their control, where the doctrine of double effect applies (and does not require soldiers to take extra risk in order to reduce harms to noncombatants). On seeing a draft of their paper, I asked Kasher if he would allow the same principle to apply to combatants fighting *against* Israel. He did not reply. M. Walzer & A. Margalit, "Israel: Civilians and Combatants," *The New York Review of Books*, May 14 2009; A. Yadlin & A. Kasher, "Israel and the Rules of War," *The New York Review of Books*, June 11, 2009.

[31] Though note that in Protocol 1 these requirements are significantly relaxed. See below, p 104.

the interpretation of public rules stipulating who ought to be considered to have civilian immunity, and who ought to have combatant rights.

At the level of rule formulation, in becoming combatants, persons forfeit certain rights (the right not to be the target of lethal force) but also gain rights (the right to target enemy combatants with lethal force, the right to be treated as a POW); all (legitimate) combatants, regardless of whether their war is (*jus ad bellum*) just, are treated equally regarding forfeiture and gains of rights.

Public rules governing conflict set out which persons are to be considered legitimate combatants. According to the Geneva Conventions, combatant status is given to 'Members of the armed forces of a Party to the conflict'.[32] Armed forces consist of:

> 'all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.'[33]

In addition, it has long been recognised in legislation that other persons can legitimately get involved in conflict; in the Hague Convention we find:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates;
>
> 2. To have a fixed distinctive emblem recognizable at a distance;

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[32] Roberts and Guelff, p 202.
[33] Ibid. p 444. 1977 Geneva Protocol 1 Article 43(1).

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'.[34]

Public rules (Geneva Convention 1 Article 13(6)) also grant combatant status to persons who do not meet the legitimate combatant criteria cited above, in a situation where they clearly have need to defend against aggression but have not had time to organise themselves such that they meet these criteria; this is the spontaneous *levée en masse* to resist invading forces.[3536]

Further, Geneva Protocol 1 Article 44 recognises that 'there are situations in armed conflict where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself',[37] and so a person has combatant status provided that they carry arms openly '(a) during each military engagement, and (b) during each time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'.[38] Unlike Geneva Convention Article 13(6) above, Geneva Protocol 1 Article 44 confers legitimate combatant status to non-uniformed[39] combatants without

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[34] Hague Convention 1907, Section 1. On Belligerents, Chapter 1. The Qualifications of Belligerents, Article 1. Ibid, p 73. A similar categorisation of combatants appears in the Geneva Conventions.

[35] Geneva Convention 1 Article 13(6), Ibid. p 203.

[36] The *levée en masse* corollary is supported by the moral grounds of the right of national defence. From a deontological point of view, the collective entity that is justified in defending with lethal force is the encompassing group (See Chapter 6); it doesn't make any difference if those exercising the right of self defence - the just cause of defending lives and wellbeing - are wearing uniforms. Nabulsi argues that according to the Grotian tradition the civilian population has no belligerency rights even when being invaded, while in the Republican tradition, acts of armed resistance by members of civilian population in order to repel an invading army are always legitimate. K. Nabulsi, "Conceptions of Justice in War: From Grotius to Modern Times," in *The Ethics of War,* eds. R. Sorabji and D. Rodin (Aldershot: Ashgate Publishing, 2006), 44-60.

[37] 1977 Geneva Protocol 1 Article 44, Roberts and Guelff. p 444

[38] Ibid. p 445

[39] I shall use 'non-uniformed combatants' to refer to persons who bear arms but when not bearing arms openly are visually indistinguishable from noncombatants.

reference to reason for engaging in conflict (that is, no mention of any reason that would count as a just cause).[40]

So we can say that:

(i) legitimate combatants are persons who meet these criteria; and
(ii) noncombatants are those who do not get involved in fighting.

Where we draw the line to denote noncombatants will depend on what we mean by 'get involved in fighting'. There are those who actually pull the triggers, but then there are many more persons who contribute to a war effort; for example, those who supply the army with what they need. Anscombe[41] suggests that there is a significant moral difference between those who supply legitimate combatants with what they need as combatants, and those who supply them with what they need as persons. But note that the public rules would exclude, for example, classifying munitions workers as combatants. Obviously they do not meet the legitimate combatant criteria, but that is not sufficient to classify them as noncombatants; some persons will not meet the criteria but can on any interpretation be considered to be involved in fighting in the conflict because, for example, they shoot at enemy combatants. So the legitimate combatant criteria cannot be used to distinguish between combatant and noncombatant, because there are combatants that do not meet the conditions for legitimacy. I will classify this third group of persons as 'illegitimate combatants':

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[40] The existence of 13(6) shows independence and symmetry theses (pp 80-81 above) to be false, at least regarding public rules; it is a rule granting combatant rights to one party in a conflict, and it is based on a *jus ad bellum* judgment.
[41] Cited in G.M Reichberg, H. Syse, and E Begby eds, *The Ethics of War* (Oxford: Blackwell Publishing, 2006), 630.

(iii) illegitimate combatants are those that get involved with fighting but do not meet the legitimacy criteria.

In many cases, it may be easy to distinguish between (ii) and (iii). Suicide bombers in, say, Iraq, fall into category (iii), while for example a baby in its cot falls into category (ii). But then in the context of a discussion of degrees of involvement in terrorism, Kasher claims that examples of persons involved with terrorism include[42] any persons who act as drivers for those who actually carry out the attack, those who manufacture terrorist weapons, and those who recruit others into the terrorist group. His examples of persons with a less direct involvement with terrorism are those who make payments to support the families of past suicide bombers, those who issue posters in praise of particular terrorists, and those who belong to organisations that have a terrorist 'wing' while not being a terrorist group itself. Now, we do not have to agree that all these persons share blameworthiness; and even if at the level of deep morality we conclude that they are collectively blameworthy at least in some degree, I have argued that in the public rules we ought to maintain a binary view of immunity distinguishing between combatants and noncombatants. But my point in referencing Kasher's claims is that once we move away from the uniformed soldier/non-uniformed civilian paradigm, the combatant/noncombatant distinction becomes blurred.[43]

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[42] These are amongst a list of persons that Kasher gives as being directly and indirectly involved in terrorism. A. Kasher, and A Yadlin, "Military Ethics of Fighting Terror," *Journal of Military Ethics* 4(1) (2005), 13 - 14. Note that I am not endorsing this paper, but referencing it to show how with irregular combatants the combatant/noncombatant distinction can become blurred. Kaurin also presents a list of categories for persons, scaled by the threat they pose (reported in Perabo, op. cit. p 142).

[43] Akande discusses the difference between considering irregulars as (perhaps temporary) members of the armed forces, or as civilians that have temporarily lost immunity, D. Akande, "Clearing the Fog of War? The ICRC'S Interpretive Guidance on Direct Participation in Hostilities," *International and Comparative Law Quarterly* 59 (2010): 190. My solution below does not make this distinction

We can add here that we ought to be consistent in drawing the line between (i) and (ii), and between (iii) and (ii). For example, if a munitions worker is considered a noncombatant in a conventional conflict, then a manufacturer of arms in a conflict involving illegitimate combatants ought also to be considered a noncombatant.

A clear line is drawn between (i) and (iii) in the sense that during each engagement with the enemy, and in the preceding deployment, combatants either meet the legitimacy criteria or they do not. While there are different ways to qualify as an illegitimate combatant, we can identify some paradigm cases. Walzer[44] recounts the story of a group of WW2 French resistance fighters who pretend to be ordinary peasants digging potatoes. When the unwary German soldiers get close to them, the French put down their shovels and take up the guns that were hidden in the fields. As a second example, an essential component of the tactic of suicide-bombing is that the bomber is visually indistinguishable from noncombatants. Insofar as the explosives are hidden from view up to the point of detonation, the Protocol 1 Article 44 condition is not met. Other cases may not be so straightforward; one way in which the picture can become more confused is if combatants change tactics over time. On one engagement they may conceal weapons and so be illegitimate, on another bear arms openly and so be a non-uniformed legitimate combatant, and at other times they could be engaged in civilian life.[45] The problem of distinguishing between legitimate and illegitimate combatants arises because of the admission of non-uniformed combatants into the former group.

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[44] M. Walzer 2002, p 176.

[45] Gross discusses this problem in M.L. Gross, "Assassination and Targeted Killing: Law Enforcement, Execution or Self-Defence," *Journal of Applied Philosophy* 23(3) (2006): 323-335. Perabo (op. cit. p 141) cites Janin's term "grocer-by-day/sniper-by-night" as just one way that this problem can be manifested.

Arguments Concerning Non-uniformed Combatants.

Kutz considers the status of uniformed and non-uniformed combatants.[46] He rejects consequentialism as an argument for equality of combatant privileges on the grounds that it is too indeterminate. His own argument is that soldiers' privileges (to kill with immunity, provided proportionality and discrimination constraints are met) ought to apply to non-uniformed irregulars who carry arms openly at the point of conflict because the justification of this privilege lies in their taking part in a collective activity aimed at political goals, and the wearing of a uniform is not relevant to this justification.

This linking of combatant rights to collective exculpation seems to be able to account for the thought that any members of a community fighting a (*jus ad bellum)* just war ought, in the public rules, be entitled to take up arms in self-defence with legal impunity. From the point of view of the deep morality of war, either engaging in combat and then disappearing into the population of noncombatants so as not to be identifiable, or perhaps even concealing arms when engaging or preparing to engage the enemy could, *prima facie*, be justifiable acts of collective self-defence against unjustified aggression (provided that the harms caused by these combatants were necessary, proportionate and only targeted legitimate targets).

However, when we look at the argument for combatants prosecuting a war without meeting the *jus ad bellum* requirements (a war of aggression, for example), we see the exculpation model is a description of how combatants are treated in public

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[46] C. Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy and Public Affairs* 33(2) (2005):148-180.

rules, rather than a moral explanation of why. For a party that is the unjust aggressor, masquerading as a noncombatant as a means to pursue an (*jus ad bellum*) unjust war could not be justified because in the deep morality no means could be justified.[47] But provided they do not violate *jus in bello* rules, combatants pursuing an unjust cause commit with legal impunity acts that, from the viewpoint of deep morality, are wrongful. They are granted a collective legal exculpation when they take part in a collective activity aimed at political goals. And since wearing of uniforms is not essential to this activity, then non-uniformed combatants ought to be considered legitimate and be entitled to pursue their unjust cause with legal impunity. But there is nothing about being involved in a collective activity aimed at political goals that in itself morally exculpates. For example, individuals involved in a violent political demonstration that causes material damage to a city centre are not exculpated merely because they are involved in a collective activity aimed at political goals. And earlier with Miller's arguments we saw that quite the opposite is the case.[48] Hence while Kutz describes the collective exculpation given to combatants in public rules, this does not give a moral explanation. So why ought those pursuing an unjust cause enjoy combatant privileges?

Kutz suggests that a reason for treating combatants equally is that when a conflict breaks out, it is often difficult to tell which side has just cause. Often it is only retrospectively that we can come to judge whether a war was justified: 'Retrospectively we care less about the properties of actions and more about the

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[47] The activities could be justifiable for persons who did not share the collective responsibility for the unjust war but were using necessary, proportionate and discriminating force to defend against combatants from the party with just cause that were intent on committing (*jus in bello*) war crimes, such as targeting noncombatants.

[48] McMahan makes similar points regarding collectives. Merely acting as part of a collective does not entail permission to do that which would otherwise be impermissible, even if the goals of the collective are political; and in domestic society complicity laws can render members of collectives liable to punishment for violent harms even if they have not personally engaged in violence. J. McMahan, "Collectivist Defenses of the Moral Equality of Combatants," *Journal of Military Ethics* 6(1) (2007): 52.

possibilities and constraints inhering in the outcomes they produce'.[49] And this, says Kutz, gives a pressure to separate issues of *jus in bello* from issues of *jus ad bellum*, and so grant combatant rights to both sides of a conflict. But now, despite his earlier rejection of consequentialist arguments, this reason for treating combatants of both parties equally in the rules seems (retrospectively) to be concerned with the outcomes of actions permitted or prohibited by the rules.

My claim regarding rules of conduct in conflict also focuses on outcomes; rules granting equal combatant privileges to those pursuing just *and* unjust causes would be justified by appeal to the consequences of those rules. Or, recognising the empirical claim, if granting equal combatant privileges in the rules leads to minimising rights violations, then those rules are justified by appeal to the proposed moral grounds. This is - in the end - an empirical matter. I note here though that this justification (or something like it) is often cited as the moral grounds of this equal treatment in the public rules. For example, Vattel argues that If combatant rights are asymmetric giving greater rights to just combatants, then both parties to a conflict are likely to claim that their cause is just and so treat opposing soldiers as unjust combatants, with severe consequences. Hence it is better (on consequentialist grounds) to grant the same rights to all combatants. He notes though that this is not to say that all parties are morally equivalent; just that their acts are granted an 'external' legality, an exemption from punishment.[50]

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[49] Op. cit. p 175.

[50] Emer de Vattel, "War in Due Form," in *The Ethics of War,* eds. G.M. Reichberg, H. Syse, and E Begby (Oxford: Blackwell Publishing, 2006), 503-517, esp. 515.

McMahan argues that a law that permitted just (jus ad bellum - JAB) combatants to wage war but unjust combatants not to do so would do nothing to constrain the unjust. The only feasible option is to grant legal permission to both just and unjust ("The Morality of War and the Law of War," 28). He makes the further claim that the legal equality of combatants fosters a professional adversary relationship between combatants, and so discourages a crusading mentality from a party believing itself to have just cause, the overall effect being fewer harms (Ibid. 30). McMahan reports - without necessarily endorsing - the view that the ' separation of *jus in bello* from the question of just cause thus effectively limits or constrains the savagery of war' in "Just Cause for War" *Ethics and International Affairs* 19(3) (2005): 10. On a final note with McMahan here, even as an advocate of

While I agree with Kutz on the equal treatment of both parties, there are moral reasons that count against combatants not rendering themselves distinguishable; it may foreseeably result in the opposing party targeting persons that they believe to be combatants even though they do not look like combatants. And insofar as those beliefs could be mistaken, then combatants that are not distinguishable from noncombatants are putting the latter at risk. Even when the opposing party attempts to engage in (what they believe are) justifiable[51] acts of war they can end up unknowingly targeting the wrong persons because the combatant/noncombatant distinction has become blurred.

A prohibition on non-uniformed combatants need not appeal to a controversial claim that they are somehow culpable regarding harmful acts of others that

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the 'deep morality' view, he concedes the strength of the argument that granting equal status to combatants in the rules may be the best way of protecting the rights in which he is interested; and that the force of the principle of discrimination (both aspects, equality of combatants and immunity of noncombatants) lies in utility - "The Sources and Status of Just War Principles," *Journal of Military Ethics* 6(2) (2007): 91-106.

Kutz suggests that one plausible reason for supporting the symmetry thesis is that over the long run, accepting the symmetry principle in the public rules does more good than denying it ("Fearful Symmetry," 68). Reichberg reports that for Grotius, independence of jus in bello (JIB) and JAB is justified by 'lesser evil' argument ("Just War and Regular War: Competing Paradigms," 204). Benbaji argues that soldiers submit to a rule that does not distinguish between unjust and just combatants because it is in their (and noncombatants') interest to do so "A Defense of the Traditional War Convention," 490. On the other hand, I note that Rodin denies that asymmetric treatment of just and unjust combatants would create perverse incentives. He gives the domestic analogy of killing and aggravated killing, a distinction that works in criminal law, so why not something similar in laws of war ("The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," 62). Finally, Coates examines the claim that the independence principle promotes restraint in war, and that the subordination of JIB to JAB would undermine restraint in war, but concludes that the key to constraint in war is to ground JIB in JAB ("Is the Independent Application of *jus in bello* the Way to Limit War?" 177). All references to Rodin and Shue, eds. (2008).

Vattel's position echoes the earlier theories of Wolff and Grotius. Significantly, Grotius (in Reichberg & Syse, p 426) argues that while according to the 'law of nations' all combatants have equal rights, according to natural law only those fighting a just cause are (morally) permitted to prosecute their cause, within the limit of rectifying the wrong. For Vattel and Grotius from the viewpoint of the 'deep morality' of war, all combatants are not morally equal. The deep morality viewpoint is concerned with the moral responsibility for harms. Volunteer combatants involved in unprovoked aggression are morally culpable for the harms they cause and are legitimate targets. Combatants defending against these aggressors are not culpable for the harms they cause and are not legitimate targets. (Provided the harms they cause are necessary, proportionate and are to legitimate targets.) The equality of combatants in public rules governing conflict has a consequentialist justification; it is a rule that will minimise rights violations in war.

[51] Justifiable from the viewpoint of the deep morality of war.

foreseeably follow from (otherwise) justifiable acts of their own. In this case, a prohibition in public rules – following my rule consequentialism - could just appeal to the foreseeable bad consequences. Note that this reason would support rules requiring that combatants bear arms openly when attacking or preparing for an attack (as in Protocol 1 above), but would also be a reason for combatants to be distinguishable from noncombatants at all times. This runs contrary to that same Article, where we found: 'Recognising, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as combatant, provided that [he meets the conditions stated above]'.[52] The justification of Article 44 would require weighing the arguments given here, that combatants should always be distinguishable, against reasons why that ought not to be required.

While we could stipulate that combatants ought always to render themselves distinguishable, such a demand may be rendered hollow if it met with persistent compliance problems combined with lack of enforceability of the rule (such as would be the case with, say, an ongoing campaign of suicide bombing, where the question of punishing the individual perpetrating an attack is moot). The advantages of being a combatant, but being perceived (for as long as possible) as a noncombatant are obvious. In the first instance, when not engaging in combat they can remain indistinguishable from noncombatants and so be indistinguishable from persons who have (in the public rules) immunity from attack. Insofar as this prevents them from being targeted, the success of masquerading as a noncombatant relies on the other party's desire to comply with laws of war. Note that provided that these persons are not masquerading as noncombatants while 'engaged in a military deployment preceding the launching of an attack in which he

[52] Roberts and Guelff p 444-445.

is to participate', they are not illegitimate merely because they are at this moment indistinguishable from noncombatants, Secondly, when preparing for an engagement in conditions of unequal war[53] it can give a weaker side a greater chance of inflicting harms on the enemy (because they are not recognised as combatants until it is too late -- in this case, they would be illegitimate combatants). On the one hand, such asymmetric tactics may be the only viable way for a weak party to prosecute a war for which they have just cause. On the other hand both of these advantages for a weaker party cause considerable problems for parties seeking to fight in accord with rules governing conduct in war. There is a high demand (deaths caused by illegitimate combatants), high cost of compliance (they are difficult to counter while staying within the rules) but high cost to others of non-compliance (deaths to civilians, if these soldiers start to target non-uniformed persons).[54] In the following, I suggest new interpretations of existing rules intended as an attempt to mitigate harms associated with non-uniformed combatants.

Targeting Non-uniformed Combatants, and Combatant Rights.

There are at least two issues concerning targeting non-uniformed combatants. First, targeting those that are (believed to be) concealing their status as combatants while deployed to attack the enemy (and so are illegitimate). Second, targeting those persons that do engage in combat – possibly without concealing arms – but are currently neither deployed nor preparing an attack, and are indistinguishable from noncombatants.

From the viewpoint of the deep morality, combatants fighting with a just cause would be *prima facie* justified in targeting non-uniformed combatants that were

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[53] An unequal war is one in which one party has overwhelming ability to achieve military objectives by conventional military means. Asymmetric tactics are a group of tactics that undermine *jus in bello* constraints, often (though not exclusively) used by conventionally weaker parties. See Chapter 5 for a full treatment of these concepts.
[54] Chapter 3 pp 77-80 above.

bearing concealed arms (if somehow they could know that was the case). And if we believe that targeting uniformed soldiers would be justifiable even when they are not attacking or preparing for attack, then the same ought to be true for targeting non-uniformed combatants. Hence the epistemological problem of knowing that they had concealed arms becomes irrelevant; in its place, we get the (equally taxing, if not more so) requirement to know that they are combatants.

Now, with uniformed soldiers, whether that soldier fired his rifle at the enemy last week, or whether he has not yet fired his rifle at the enemy but there are plans that will result in him doing so next week, is irrelevant. He is a legitimate target. With the non-uniformed combatant, if he fired his rifle at the enemy, say two seconds ago, then presumably he is a legitimate target (assuming targeting non-uniformed persons is permissible at all). But what if it were last week, or last month or year? Even more worrying would be the claim that he is a combatant because he is going to fire his rifle tomorrow or next week. That would seem – potentially - to bring almost the whole population into the category of legitimate target.[55]

The real problem though, is that *ex hypothesi* these combatants are indistinguishable from noncombatants, and I have argued that even where noncombatants are morally blameworthy regarding an unjust war, they ought to retain immunity in the public rules. This is reflected in the public rules that clearly state 'The civilian population as such, as well as individual civilians, shall not be

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[55] Akande (op. cit. p 189) reports the ICRC view (which is an interpretation of Additional Protocol 1 51(3)) that civilians lose immunity for the duration of their direct participation in hostilities, and for the duration of deployment to and return from those hostilities. Singer gives the example of the Lebanese farmer close to the Israel border. Hezbollah have set up a remote-operated rocket on his land, pointing at Israel. He is ordered, by Hezbollah, to press the button to launch this rocket when they telephone him to give him the order. At what point, if any, is this farmer a combatant and therefore a legitimate target? P. W. Singer, *Wired for War: The Robotics revolution and Conflict in the 21st Century* (New York: Penguin books, 2009), 402.

the object of attack'.[56] So, as we have seen, the problem is that if targeting non-uniformed combatants who are not currently bearing arms openly were permitted in the public rules, a party seeking to defend itself within those rules could end up mistakenly targeting noncombatants. A paradigm example of this sort is a woman approaching a military checkpoint; the soldiers believe that the bulge under her coat is a bomb and shoot to defend themselves; it turns out that the woman was pregnant.[57]

A further danger of permitting the targeting of non-uniformed persons is the generation of incentives to act with negligence or recklessness with regard to noncombatant immunity. A stronger party might (morally and legally, wrongly) decide that the opponents tactics give them licence to launch an attack that (to the impartial observer) fails to discriminate between combatant and noncombatant, accompanied with the claim that they are not failing to discriminate because all these non-uniformed persons can be considered combatants.

Gross[58] considers 'naming' and 'named killings' as at least a partial solution to the problem of dealing with such combatants. The tactic employs intelligence to give the location of a non-uniformed combatant who is not currently engaging the enemy – perhaps driving along a street in a town or city. Then an attack is launched against him – for example a missile launch from a helicopter. Such a strategy would come with costs, he argues. Firstly it would be reliant on reliable intelligence that in turn would rely on collaborators, which have a corrosive effect on society. Secondly, it may have the effect of 'letting the genie out of the bottle', meaning that once targeted killings of those not in uniform is presented as

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[56] 1977 Geneva Protocol 1 Article 51, in Roberts and Guelff p 448.
[57] There are a large number of such incidents, involving unarmed drivers and motorcyclists, reported in Afghanistan; see *The Guardian*, The Afghanistan War Logs, http://www.guardian.co.uk/world/2010/jul/25/afghanistan-war-logs-military-leaks.
[58] Op. cit.

acceptable practice, all parties to the conflict could start doing it, thus seriously undermining the principle of discrimination.

These problems might recommend, with reference to justifying the rules by the consequences, an interpretation of the prohibition on targeting civilians as a prohibition on targeting all non-uniformed persons that are not currently bearing arms openly. This interpretation would rule out, for example, 'targeted' or 'named' killings,[59] and what the US Army refers to as 'status-based engagements' on persons neither uniformed nor bearing arms openly.[60] Also, in terms of proportionality of collateral harms, all non-uniformed persons not bearing arms openly could be taken to have full civilian immunity.

With regard to combatant rights, there are several reasons for recognising irregular forces as legitimate combatants and not as guilty of perfidy. From a deontological point of view, parties to conflict that do not have access to conventional military means ought to be able, legitimately, to pursue a just cause (self-defence). From the consequentialist viewpoint, other benefits of Protocol 1 Article 44 apply to both (*jus ad bellum*) just and unjust non-uniformed combatants. Recognised as legitimate, they would have combatant rights (including prisoner of war status), and following from this they would have some reasons to abide by existing rules of conduct in conflict. Alternatively, if they were branded as illegitimate and perfidious, they may be more inclined to disregard those rules

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[59] Hence I disagree with the conclusions of the Supreme Court of Israel, who claimed that targeted killings could be permissible, *Public Committee Against Torture in Israel v Government of Israel*, Supreme Court of Israel, HCJ 769/02 (13 Dec 2006), elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf (accessed 20/1/11)

[60] Perabo reports that the United States Standing Rules of Engagement explicitly state that attacks against so-called civilian belligerents can be permissible. Op. cit. p140. The leak of US documents in July 2010 revealed that US Task Force 373 was carrying out 'named killings' in Afghanistan, with the associated harms to noncombatants that I have claimed would accompany such actions. *The Guardian*, Afghanistan The War Logs. http://www.guardian.co.uk/world/2010/jul/25/task-force-373-secret-afghanistan-taliban. (accessed 27/7/10)

(particularly since if captured, they would not have protection under Geneva Conventions, as with the prisoners at Guantanamo Bay).[61]

Neither of these suggestions[62] is without dangers. For the latter, the content of the law will require weighing these considerations against the harms to noncombatants that follow when combatants are not distinguishable. Also, if combatants have nothing to lose (that is, do not lose combatant rights) by remaining indistinguishable, that may encourage them to do so. And that brings us to the danger with the first suggestion, with a prohibition on targeting anyone not in uniform and not bearing arms openly. A party seeking to abide by the public rules governing war may 'have their hands tied' when facing combatants that masquerade as noncombatants. As stated in Chapter 3 (p. 68), perhaps the best we can do is give reasoned argument for amendments and give them some sort of trial. These suggestions could be included in an army's Rules of Engagement, for example.

Conclusion.

If we want to maintain the principle of discrimination and the prohibition on attacking civilians, then we do not have a completely satisfactory solution to the problem of combatants masquerading as noncombatants. While there appear to be good consequentialist reasons for requiring combatants to be identifiable – perhaps at all times – any such requirement would be hollow in many situations. We have to recognise that compliance with such a rule would likely be low where a weaker party does not have the resources to muster a regular army, and can gain

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[61] McMahan argues that once combatants are charged with criminal action, 'they might as well abandon all restraint in order to win the war' (McMahan 2009, 30). Although his discussion is in the context of combatants unjust according to *jus ad bellum*, the same point would apply to those accused of being in breach of *jus in bello* regulations. Much the same point is made by Rodin in D. Rodin, "The Moral Inequality of Soldiers: Why *jus in bello* Asymmetry is Half Right," op. cit. p 61.

[62] A prohibition on any targeting of non-uniformed persons not bearing arms openly, and granting combatant rights to all persons that get involved in fighting (by bearing arms,for example).

advantage from lack of uniform. It is better to look at the situation from the other way around, and stipulate who is to be treated as a combatant, and who as a noncombatant.

In order to prevent violations of noncombatant rights, rules of engagement could stipulate that unless they are bearing arms openly, attacking non-uniformed persons is prohibited (so in interpreting Geneva Protocol 1 Article 51, all non-uniformed persons not bearing arms openly are to be treated as civilians for the purposes of targeting; that is, they may not be targeted). Persons suspected of using armed force would then have to be treated according to the criminal law rather than the war paradigm. On the other hand, in interpreting Protocol 1 Article 44, *all* persons who do bear arms could be treated as legitimate combatants for the purposes of conferring combatant rights, particularly important when they become *hors de combat*, either injured or as prisoners of war. If they were suspected of violating the rights of others, this would also determine whether they would be charged with war crimes, or dealt with under domestic criminal law.

Thus the distinctions between combatant and noncombatant become binary conceptions, though the lines are drawn in different places depending on whether we are considering rules regarding legitimate targets, or rules concerning combatant rights.[63] So for example, a person who is not a member of the army but uses armed force and subsequently adopts the appearance of a civilian, would have immunity from attack in the public rules; from the point of view of legitimate targets, they would be grouped with civilians. On the other hand, if they were captured, they would have combatant rights, meaning that they would be

[63] Akande observes that this distinction is present in the current rules, op. cit. p 184.

considered a prisoner of war and would have legal impunity for harms committed that were not contrary to the laws of war.[64]

The aim of these recommendations is to ameliorate the problems arising from the status of non-uniformed combatants and illegitimate combatants, set out above. Taking account of both the epistemological and moral problems regarding combatant status, my recommendations for public rules would give clear guidelines for action - essential in a complex and confused arena such as armed conflict. Certainly they would give an advantage to the irregular combatants and I acknowledge that it may generate perverse incentives for combatants to masquerade as noncombatants.[65] But these costs would have to be weighed against the alternative, the possibility of a breakdown of the principle of discrimination.

Many of the issues discussed above regarding combatant status and violation of noncombatant immunity are typical of 'asymmetric conflict'. In Chapter 5 I will now look at asymmetric conflict in more detail.

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[64] Laws of war interpreted to include these persons as legitimate combatants. There are procedural issues that would need to be addressed to put my suggestions into practice. First, some way of establishing whether an individual had, or had not, participated in hostilities would be necessary. Presumably we cannot just take their word for it - they could commit murder, then claim their action constituted participation in hostilities and so they had commited no crime. Some cases may be clear-cut: if someone murders their partner in an instance of domestic violence, this could not be interpreted as participation in hostilities. If someone were captured on video engaging the enemy with firearms, this then would give evidence of participation. In contested cases, a tribunal could hear evidence and and try to reach a conclusion: if the act for which the person had been arrested were judged to be a participation in hostilites, then they are henceforth treated as a combatant (immunity for targeting enemy combatants - but violations of IHL treated as war crimes). If the act were considered not to constitute participation, they enter the criminal justice system and are treated accordingly. Hence a non-uniformed unarmed person could be apprehended - using methods and proportionate force appropriate for the 'police action' paradigm - either on suspicion of being a combatant, or of commting some crime. If, once apprehended, there is dispure regarding which category they fit into, a tribunal could hear evidence and decide. Henceforth the person is treated according to either the crime or war paradigm. There is no legal 'black hole' into which they fall, at the mercy and whim of their captors.

[65] Particularly given my earlier recommendation, that rules retain full immunity for noncombatants.

5. ASYMMETRIC CONFLICT.

In this chapter I will first explain Rodin's concepts of asymmetric tactics and unequal war.[1] Then I will give some analysis and criticism of his argument, and show that if we draw on the ideas from another Rodin paper 'Terrorism without Intention',[2] his list of asymmetric tactics is incomplete (in an important way). I will describe and contrast Luban's conception of asymmetric war[3] and argue that it is distinct from Rodin's use of 'asymmetric' and 'unequal'. Then finally I evaluate arguments concerning remote weapons systems and asymmetric removal of risk, arguing that for a consequentialist justification of *jus in bello* constraints the principal concerns will be whether those systems and tactics increase risk to noncombatants. I also argue that where remote systems are deployed there ought to be some institutional framework for attribution of blame for unjustified harms.

Rodin on Asymmetric War.[4]

Rodin identifies six categories of asymmetric tactic; chemical, biological and nuclear weapons, information war, terrorism, and a group of operational concepts including human shields and use of guerilla tactics.

Asymmetric war is contrasted with unequal war, the latter being where one side has overwhelming superior resources judged in terms of conventional military power. The two concepts are linked; asymmetric tactics are typically used when a weaker power would have no chance of success if only conventional tactics were used.

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[1] D. Rodin, "The Ethics of Asymmetric War," in *The Ethics of War*, eds. R. Sorabji, R. and D. Rodin (Aldershot: Ashgate Publishing, 2006), 153 - 168.
[2] D. Rodin, "Terrorism without Intention," *Ethics* 114(3) (2004): 752-771.
[3] David Luban, "Preventive War and Human Rights," in *Preemption: Military Action and Moral Justification*, eds. H. Shue and D. Rodin (Oxford: Oxford University Press, 2007), 171 – 201.
[4] Rodin's arguments that I summarise in this section are from Rodin 2006 op. cit.

Rodin claims that all the asymmetric tactics depend on some subversion of *jus in bello* constraints. It follows that for standard interpretations of the Just War tradition, justice[5] and fairness can come into tension concerning asymmetric tactics. This is because the weaker party may have the just cause, but they would be denied the chance to even up the odds of winning (that is, denied fairness) by the *jus in bello* prohibition of asymmetric tactics.

Supporters of asymmetric tactics might argue that *jus in bello* constraints ought to be relaxed for weak parties fighting a just war. However, standard interpretations of Just War theory do not allow any relaxation of those constraints. This is because, Rodin argues, those rights protected by *jus in bello* are not mere conventional rights that can be traded-off.[6] Rather, these rights are based on deep foundational beliefs about the person; as I argued in Chapter 2, they are grounded in prohibitions on violations of bodily integrity.[7]

Rodin's 'novel' solution is to achieve fairness by strengthening the *jus in bello* constraints for the stronger party. Three specific recommendations are: outlawing the targeting of 'dual-use' facilities (e.g. power stations), requiring the highest standards of evidence that a target is legitimate before action is taken, and strengthening proportionality constraints on judgments of 'collateral' damage.

Rodin considers and rejects two objections. First, it may be thought that weak parties that violate *jus in bello* thereby annul reciprocal moral duties on the part of

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[5] Though Rodin juxtaposes 'justice' and 'fairness', we might alternatively say that *rightness* and fairness can come into conflict, to avoid confusion with the 'justice as fairness' conception.

[6] See Chapter 3 pp 79-80 for the view that the *jus in bello* constraints of the Just War tradition are binding even when faced with opponents that violate (or wish to do away with) these constraints. There, I argue that some of the other constraints governing conduct in conflict are only binding when reciprocated.

[7] This is consistent with my distinction between reciprocal and nonreciprocal rules governing conduct in war if we interpret Rodin's use of *'jus in bello* constraints' to refer narrowly to the proportionality, necessity and discrimination requirements of the just war tradition, rather than more widely to the body of international law governing conduct in war.

the stronger party. If that were the case then *jus in bello* constraints ought to be weakened rather than strengthened for strong parties when they are targeted by weak parties adopting asymmetric tactics. However, this is not correct. The *jus in bello* constraint protects fundamental rights of all members of the weaker community. Violations of law by some members of that community do not thereby annul our duties to all the others (and weakening *jus in bello* constraints would in many cases have the effect of undermining duties to noncombatants - more on this below).

Second, Rodin considers whether his proposal could be effective. Since his concern is for a weak party fighting a just cause, his proposal amounts to the claim that a strong party fighting an unjust cause (that is, a party that is prepared to override *jus ad bellum* constraints) ought nevertheless to abide by strengthened *jus in bello* constraints. As implausible as such restraint may seem, Rodin argues that there would be good reason to embody his proposal in law. The violation of these laws could shape how citizens view their own governments, and those laws could help shape judgments of appropriate compensation and punishment in the wake of unjust aggression.

A third objection is a 'reformulation' of the second. Belligerent parties rarely believe their cause to be unjust, so the likely problem is not the plausibility of a party admitting they are fighting an unjust war but nonetheless complying with the strengthened *jus in bello* prohibition. Rather, parties will not agree that their cause is unjust in the first place and so not recognise any motivation for them to take on 'additional *jus in bello* burdens'.[8]

[8] Rodin 2006, p 163.

Rodin's response is that because of the costs of war, strong parties are much more likely than weak parties to engage in 'wars of choice'. And such wars are more likely to be (*jus ad bellum*) unjust, compared with defensive wars of necessity. From an objective, rational viewpoint, strong parties will be aware of the likelihood of their engaging in a conflict that they believe is just but is actually unjust, and moreover it being a conflict that they are likely to win because of their military might. Recognising this, such parties will see it as reasonable that the laws of war place greater *jus in bello* constraints on them. That concludes my summary of Rodin's arguments.

Commentary on Rodin.

In this section I will: relate Rodin's Just-War-based argument to my rule consequentialism; criticise his replies to the objections he considers; argue that a closer look at the relationship between unequal and asymmetric reveals an additional asymmetric tactic to add to Rodin's list; and analyse Luban's concept of asymmetric war and argue that it is distinct from Rodin's.

The most pressing *jus in bello* constraint with which Rodin is concerned here is the principle of discrimination. Combatants are legitimate targets and noncombatants are not; and while some collateral harm to noncombatants can be permissible,[9] disproportionate harm is not. Equating to this, my rule consequentialism would recommend public rules prohibiting these harms to noncombatants, in order to minimise violations of their right not to be attacked.[10]

Now, I have three criticisms of Rodin's responses to the objections he considers. First, in reply to the second objection, Rodin admits that his proposal may not be

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[9] In the sense that agents responsible for those harms are not thereby liable to punishment.
[10] I analysed that right, and the combatant / noncombatant distinction in Chapter 4.

effective in limiting the actions of states in war, but would nonetheless have a role in how those actions are judged. But this seems to pave the way for a compliance issue. If a strong party wilfully fails to comply with the law (and moreover it is foreseen that strong parties will not comply) this runs the risk of undermining the credibility of the law and associated institutions.

Secondly, Rodin says that while political leaders of strong states may believe their war to be just, they could rationally accept that from an objective viewpoint their war would likely be judged unjust. Therefore they would accept strengthened *jus in bello* constraints, as the stronger party. But we can question whether decision-making by leaders of powerful states engaging in unjust wars would be rational and objective in the way that Rodin's argument requires. That is not to claim they would be necessarily irrational, just that we would expect self- (national-) interest rather than objectivity to dominate decision-making.

I note here that Rodin's arguments do not indicate public rules in which a party, on admission of launching an unjust war, is then required to abide by strengthened *jus in bello* constraints. That would be implausible. Rules could be devised requiring the *stronger* party to have the extra constraints, with no reference to justice of the war. But then I doubt whether strong states would be motivated to be signaturies to any such treaties.

Third, even if leaders of strong states did proclaim a willingness to take on extra *jus in bello* prohibitions because they recognised the possibility of engaging in unjust conflict, they might still claim that those extra restrictions do not apply to the current conflict because - they might say - we are certain that this conflict is just. Alternatively, they may simply claim that in this conflict they are not the stronger

party. In other words, they might 'pay lip-service' to a revised (strengthened) law while denying the applicability of it to them for any given conflict.

By comparison, my suggestions in the preceding chapter - in particular regarding combatant rights and legitimate target status - do not make these demands on the stronger party because they apply to all parties to a conflict. On the other hand, my suggestions would favour a party fielding irregular combatants, which is more likely to be the case for a weaker party (which according to Rodin is less likely to be fighting a war of choice and hence is less likely to be fighting an unjust war). Hence my suggestions may go some way towards relieving the tension between justice and fairness, which is Rodin's aim. Of course, for me, the justification for adopting these interpretations would be if they were to reduce rights violations in war compared with other interpretations.[11]

Next, it is worth commenting on the use of the term 'unequal', as this is a central concept in Rodin's argument. This does not simply refer to a difference (great or small) in the ability to achieve military objectives. Rodin ties this term to a caveat - a difference in the ability to achieve military objectives by conventional means. So for example, unequal war refers to the situation where one party is 'conventionally weak and powerless';[12] where this party does not 'have the military capability to engage their enemy on roughly equal terms in a conventional war';[13] and where the stronger party has 'no peer competitor'; there is no power capable of engaging it on roughly equal terms in a conventional war'.[14] It is under these conditions that the conventionally weaker party sometimes adopts asymmetric tactics in order to counter this inequality, and perhaps even reach rough equality 'at least in the

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[11] Hence the motivation for and justification of my interpretations is neither an attempt to 'even up the odds', nor to create conditions of fairness.
[12] Rodin 2006, p 155.
[13] Ibid. p 155.
[14] Ibid. p 155.

sense that neither side has the ability to decisively achieve its key military objectives'.[15]

Now, Rodin correctly identifies that 'the disparity between the capabilities and tactics of adversaries that defines asymmetric war is constituted as much by the means and capabilities of the conventional power as it is by those of the non-conventional, disruptive actor'.[16] However, when discussing asymmetric tactics, he focuses on the weaker party and the use of those tactics to counter the conventional inequality. For example, 'tactics of asymmetry are a primary means by which weak states and non-state actors can introduce an element of strategic equality to conflict that would be radically unequal if fought on conventional terms'.[17] If on the other hand we look at the tactics of the conventionally stronger party in unequal war then we can, I will argue, identify an additional category of asymmetric tactic not listed by Rodin.

Rodin cites McKenzies's definition of asymmetric war: 'Leveraging inferior tactical or operational strength against American vulnerabilities to achieve disproportionate effect with the aim of undermining American will in order to achieve the asymmetric actor's strategic objectives'.[18] This definition identifies asymmetric tactics exclusively with those targeting 'American vulnerabilities', and also identifies asymmetric tactics exclusively with forces of inferior tactical or operational strength. Rodin's description of the common characteristic definitive of asymmetric tactics contains neither of these elements: 'Each of the asymmetric tactics identified above depends for its effectiveness upon some degree of

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[15] Ibid. pp 155 – 156.
[16] Ibid. p 155.
[17] Ibid. p 155.
[18] Ibid. p 154.

subversion of the principles of *jus in bello*, and in particular of the principle of noncombatant immunity'.[19] It is this feature that I will focus on.

Now when one party has 'vast superiority in air power and high technology weaponry',[20] that conflict will probably be unequal. Moreover, the stronger power can use that superiority to achieve its strategic goals while minimising the risk to its own combatants.[21] However, the tactics it may employ - such as high-altitude aerial bombing and use of long-range weaponry - can fail to discriminate between legitimate and illegitimate targets. And insofar as they do fail to discriminate, the effectiveness of the tactic (achieving strategic aims while minimising risk to own combatants) depends on a preparedness to cause collateral harms that would be considered unjustified under traditional interpretations of the proportionality constraint. These tactics can therefore be considered negligent or reckless with regard to noncombatant immunity, a central principle of *jus in bello*.[22]

Hence we can add to the class of asymmetric tactics; use of weapons and tactics such as long-range missiles and high-altitude bombing employed by superior conventional forces that reduce risk to one's own forces but at the cost of increased risk to noncombatants. These rightly belong to that class because they share the common factor of relying on the subversion of *jus in bello* prohibitions for their effectiveness; in this case the subversion is in the form of negligence or recklessness with regard to noncombatants. (Rodin[23] argues that such negligence and recklessness can rightly be regarded as terrorism. If that is correct then we do not need to add to Rodin's list, as terrorism is already included. Nonetheless, it is worth including these tactics as an extra category in the list as doing so brings to

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[19] Ibid. p 157.
[20] Ibid. p 155.
[21] I will return to this in more detail below.
[22] See for example Rodin 2004.
[23] Ibid.

the fore the fact that asymmetric tactics as defined by Rodin are employed by powerful as well as weak parties. My disagreement with Rodin is not whether, for example, high-altitude bombing over civilian populated areas can be rightly regarded as terrorism – we agree that it can. My claim is that asymmetric tactics are not exclusive to weaker parties, and high-altitude bombing and other remote tactics and systems ought to be included in the list.)

A recent example of negligence / recklessness towards noncombatants by the conventionally stronger party in an unequal war is the use of cluster bombs by Israel in Lebanon in 2006.[24] (Kasher[25] defends the use of cluster bombs but my arguments below will show that such weapons are unjustifiable, not on the grounds of risk-removal, but on failure of discrimination.)

I note here that Luban[26] uses the term 'asymmetric warfare' differently. The *jus in bello* constraints treat combatants symmetrically; they have the same rights and duties regardless of whether they wage just war according to *jus ad bellum*. Luban argues that the moral symmetry is grounded in the mutual jeopardy, enmity and risk that soldiers face when they 'don a uniform'. That symmetry of mutual risk is lost when one belligerent party employs means that do not involve risk and jeopardy for their own combatants. For example, destroying the opponent's air defences and then striking from the air with impunity. Waging war through the use of 'drones' also results in asymmetric loss of risk; we could imagine a belligerent party waging war totally through the use of drones at some time in the future.[27]

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[24] Human Rights Watch: "Israel's Use of Cluster Bombs Shows Need for Global Ban", www.hrw.org/english/docs/2008/02/17/isrlpa18071.htm (accessed 20/2/08)
[25] A. Kasher, "The Principle of Distinction," *Journal of Military Ethics* 6(2) (2007): 166.
[26] Op. cit.
[27] At the time of writing, this looks increasingly like the near future or even the present. See for example P. W. Singer, *Wired for War: The Robotics revolution and Conflict in the 21st Century* (New York: Penguin books, 2009); and The Guardian, Afghanistan War Logs, http://www.guardian.co.uk/world/2010/jul/25/reaper-drone-missions-afghanistan-flights.

Luban calls this asymmetric removal of risk asymmetric warfare.[28] He suggests that morally speaking, targeting enemy combatants without mutual risk is indistinguishable from targeting civilians.

Since the scenarios Luban describes here do not necessarily involve negligence or recklessness regarding noncombatants (nor any other subversion of the conventional reading of the principle of noncombatant immunity) these are not asymmetric tactics as defined by Rodin. But although my first example[29] is a situation of unequal war (as defined by Rodin), the latter (conducting war by drones) is not insofar as this would not be conventional war. So Luban's asymmetric war is not equivalent to Rodin's unequal war. Hence the phenomenon (and problem) identified by Luban is distinct from both asymmetric tactics and unequal war as conceived by Rodin.

I have linked the problem with asymmetric removal of risk to failure of discrimination; rules concerning such tactics ought to consider the violations of noncombatants' rights that result, just as with other tactics that subvert *jus in bello* constraints. Luban links the problem with asymmetric removal of risk to a loss of 'moral symmetry'. I now evaluate these analyses in more detail.

Use of Remote Weapons Systems.

The NATO campaign in Yugoslavia in 1999 was characterised by bombers releasing their bombs from high altitude in order to reduce the risk to the aircrew; the campaign was criticised because by so doing, the targeting was less accurate than it would have been if they had operated from a lower altitude (and thus faced

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[28] This account of asymmetric war is similar to Martin Shaw's 'risk transfer'; see 'Risk-transfer militarism: the new Western way of war,' at http://www.theglobalsite.ac.uk/justpeace/201shaw (accessed 13/6/11)

[29] Destroying the opponent's air defences and then striking from the air with impunity.

greater risk to themselves). Remote-controlled weapons systems are, at the time of writing, being used by the US in Afghanistan and Pakistan.[30] They are also used by Israel in Gaza.[31] Typically these involve unmanned aircraft flown from a control room removed from the point of conflict; the aircraft are equipped with cameras to aid identifying targets, and weapons to attack. It is not difficult to imagine the full-automation of these aircraft, enabling them to seek out and attack targets autonomously.[32] If that were the case, then the conflict would be carried out by 'killer robots' rather than soldiers. These are all examples of asymmetric risk in conflict. The reasons for adopting these tactics and technologies are obvious; to carry out operations while not putting one's own combatants in danger.[33]

Killmister, Sparrow and Walzer.

Killmister, Sparrow and Walzer present arguments against asymmetric removal of risk; like Luban, they all are grounded in Just War concepts. Killmister[34] gives an example of a culpable aggressor using remote weaponry to attack another state. In this scenario, the aggressor state does not use any conventional forces and only uses remote weaponry, keeping all their combatants out of harms way. As the targeted state is not able to attack any enemy combatants in self-defence, it now (in Killmister's scenario) has three options. It can surrender, target civilians of the aggressor state, or target what Killmister calls civilian combatants - people such as

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[30] http://news.bbc.co.uk/1/hi/world/south_asia/7917604.stm (accessed 1/11/09)
[31] http://www.hrw.org/en/news/2009/03/20/remote-control-death (accessed 1/11/09)
[32] This is not science-fiction. According to Singer, the technology already exists. See P. W. Singer, op. cit. Chapter 1.
[33] Coady refers to this as 'riskless war'. A. Coady, "The Status of Combatants," in *Just and Unjust Warriors,* eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 169. He also recognises that the problems of asymmetric war include a conventionally stronger power inflicting harm on noncombatants, with immunity.
[34] S. Killmister, "Remote Weaponry: The Ethical Implications," *Journal of Applied Philosophy* 25(2) (2008): 121-133.

politicians who issue instructions to the armed forces.[35] Since the aggressor state is likely to ensure the latter is not possible, the options are reduced to the first two. Just War theory now reduces the target state to a morally unacceptable position: it has just cause, but since it cannot (with any prospect of success) wage defensive war justly it either has to surrender or violate *jus in bello* and wage war unjustly. Killmister sees only two solutions; either a new principle requiring war to be fought on an equal footing[36] or abandon Just War theory as a relic unsuited to the 21st Century.[37]

Regarding Killmister's thought that Just War theory is not suited to the 21st Century, note that asymmetric removal of risk is not a new phenomenon. Use of long-range artillery, bow and arrow, heavy personal armour, and the development of the tank are historical examples of technology creating asymmetric risk. In each case, the agent maintains an effective fighting capability, (shells, arrows, sword, and machine gun) while reducing the opponent's ability to cause harm to them by rendering themselves less vulnerable to their weapons - ideally, invulnerable. Modern examples are high-altitude aerial bombing, and use of 'drones' as discussed above; possible future examples are 'robot killers' as per Sparrow (discussed below). If asymmetry removal of risk poses a problem for Just War theory, then it always has.

Killmister's proposed new Just War principle – requiring war to be fought on an equal footing – is interesting. At first sight, it may seem that such a principle could reduce rights violations in war because in her example both sides could prosecute the war without violating *jus in bello*; Killmister's target state would be able to resist

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[35] Ibid. p 122. If these remote weapons systems were being operated by non-enlisted personnel, these might also qualify as Killmister's civilian combatants. See Singer 2009, p 386.
[36] Much like the boxing / chivalric combat examples that I discuss below.
[37] Op. cit. p 131.

unjust aggression justly. Further, if proscribing technological advantage in war were enforceable, it may reduce the frequency of resort to arms as a means of pursuing policy. This is because states would choose to wage war less often if they were not allowed to take advantage of technical superiority.

There are two obvious problems though; firstly, we can easily imagine a war fought in accord with *jus in bello* discrimination which, because the armies are roughly equal in capability, has reached a stalemate. There may be no *jus in bello* violations and equal risk, yet appalling carnage. In this scenario, a technological advantage asymmetrically removing risk could break the stalemate and shorten the conflict, reducing the loss of life. The introduction of the tank in WW1, and the atom bomb in WW2,[38] illustrate this claim. A requirement that war is engaged on roughly equal footing could lead to protracted conflict with an overall increase in harms.

Secondly, states possessing (or likely to possess) technological advantage are unlikely to agree any such principle in international treaties, so including it in Just War theory as a moral principle is hollow. It is not surprising that armies use these technologies where available, and seek to develop new forms of them to allow new risk-free tactics. In some formalised form of chivalric combat, symmetric risk may be seen as morally desirable by both parties. Analogously, in the boxing ring, the whole point of the contest is that each fighter steps into the ring facing equal risk; it would be contrary to the nature of the sport for one fighter to use some special arm extensions that allowed him to punch the opponent without risk of any counter-punches. Any such additional equipment is against the rules. Moreover, fighters and spectators would consider this asymmetry unfair and contrary to the

[38] At least with respect to the claimed benefits of using the bombs.

spirit of the contest. The equipment ought to be against the rules to maintain a fair contest.

However, war (or modern war) is not like a chivalric contest, nor a boxing match. Suppose an army has the technology to prosecute a conflict with reduced risk to its soldiers, and those means are not contrary to norms governing war (for example, they can discriminate between combatant and noncombatant, do not foreseeably present disproportionate harm, etc). Suppose further that this army publicly announced that it would not use this technology, in order to give the opponent 'a fair chance', or to make it 'a fair fight'. This would be hard to justify to soldiers and public alike. They are likely to cry out 'the other side would not refrain from using this technology, so why should we put our soldiers at unnecessary risk'. Then further suppose that leaders of this state are asked to enter into agreements banning this technology, because it creates 'unfair' warfare. They are not likely to agree to any such legislation so long as the technology remains solely in their hands. They might say 'the only reason you think this is unfair is because we have the technology and you don't,' and ask the rhetorical question 'If you (and you alone) had the means, would you still say it was unfair?' This imaginary state might be more likely to reach agreement if the technology became more widely available to their opponents.[39] Finally, this state's unwillingness to agree to any legislation would be significant if, as is likely, it is an already powerful state that has this technological advantage.

It would miss the point to claim that the previous paragraph treated fairness as a completely subjective concept and ignored the possibility of an objective

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[39] International bans on dum-dum bullets, and chemical weapons serve to illustrate how agreements are reached regarding weapons that would otherwise be within the capability of all parties.

assessment of fairness. The above is not meant to be an argument for the permissibility of asymmetric tactics grounded in a *conception* (either subjective or objective) of fairness; it is meant to be a demonstration of how leaders of states and armies might reason, regarding such a technological advantage. In sum I do not believe that any moral claim that soldiers on both sides ought to face (roughly) equal risk is going to dissuade any military leader from utilising 'risk-free' remote weaponry when they are available and it is advantageous for them to do so.

In the end, Killmister's conclusions are curious. We can agree with her that the aggressor in her example ought not to be waging war using long-range weapons. Yet that agreement can be reached without reference to any paradoxes for Just War theory. The aggressor state ought not to be waging war because (*ex hypothesi*) their war does not have a just cause.

Now suppose that these remote weapons - unmanned drones, say - were programmed to search autonomously for some target or type of target, and to attack. With the human remote operator taken 'out of the loop', these drones would now be 'killer robots'. Sparrow argues that the use of 'killer robots' would be unethical because responsibility for war crimes involving them could not be pinned on anyone (neither programmers nor designers, commanding officers,[40] nor robots).[41]

First he argues that the possibility of responsibility attribution is a moral requirement of *jus in bello*. He supports this with a deontological claim that respect due to the enemy requires responsibility for deaths caused, and with a

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[40] Singer makes the further distinction between the combat commander who authorised the operational use of the system, and the commanding officer who made the decision to deploy the system for use. Singer op. cit. p 408.

[41] R. Sparrow, "Killer Robots," *Journal of Applied Philosophy* 24(1), (2007): 62 – 77.

consequentialist claim that the threat of identifying and prosecuting war criminals would be overall beneficial. Sparrow then argues that the programmer could not be held responsible for war crimes involving these killer robots if those crimes were a result of behaviour that could not have been predicted by the programmer.[42] And if the robot were genuinely choosing its target, it would be unfair to hold the commanding officer responsible. Finally, he argues that since these killer robots could not be considered 'moral persons', it would not make sense to hold them morally responsible for violations of *jus in bello*. So, he argues, the finger of responsibility could not be pointed at anyone and that is contrary to *jus in bello* requirements.

Now I agree that responsibility for war crimes ought to be attributable. For me though this is not grounded in respect for the enemy; rather, it is on the grounds that the attribution of responsibility would contribute towards reducing rights violations. But that suggests that what is required is not that all outcomes are morally attributable; rather, that it is morally required that there is some institutional solution for attributing legal responsibility. The argument then shifts from Sparrow's search for moral responsibility, to the question of who ought to be held responsible according to public rules governing war. Then (for example) the

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[42] This would be the case if the robot developed new patterns of behaviour that could not have been foreseen by the programmer. The Afghanistan War Logs in The Guardian (op. cit.) cites a case of an armed 'drone' going out of control. Also, given that all automated systems will have acknowledged limitations, the programmer would not be responsible if the operator used these robots in ways not recommended by him/her. In both cases there is no crime since the necessary *mens rea* is absent. We may though consider the programmer blameworthy with respect to such activities. By comparison suppose a UK manufacturer sold, to the Chinese government, apparatus that could be used for torture, but included a note saying 'This equipment is not meant to be used to torture persons'. The manufacturer may not be directly responsible when the Chinese go ahead and use this equipment for torture, but we may consider them morally blameworthy nonetheless. (There may be some hypocrisy if we did not also, for example, consider the Ford motor company blameworthy for producing apparatus that very effectively and foreseeably kills people. They ought not to get off the hook merely by issuing handbooks with such equipment warning users that the machinery is intended to be used only within the relevant road traffic regulations.)

commanding officer that deploys 'killer robots' could be held responsible in the public rules for the outcomes of that deployment.[43]

At the core of Sparrow's argument is not the moral responsibility issue; that would not be a problem (at least he does not present it as a problem) if the 'killer robots' only attacked permissible targets with proportionate force. Sparrow's worry of responsibility arises because of the problem of the robot autonomously 'choosing' to attack the wrong target. So the core problem is a failure of discrimination; the 'killer robot' weapon/tactic, as presented in Sparrow's argument, cannot meet requirements of discrimination. So the public rules governing war ought to hold the commanding officer responsible for unjust harms, just as they would be with any other weapon or tactic that cannot meet the discrimination requirement.

Walzer also addresses the issue of removal of risk.[44] In the context of use of high-altitude aerial bombing in Kosovo, he refers to a new anomaly - a new dangerous inequality. 'We' are prepared to kill enemy soldiers and cause collateral damage, but not prepared to put 'our' soldiers at risk. That is, the US military relies on air power and technology to avoid putting soldiers on the ground and therefore at risk. This is not a possible moral position, he claims; you can't kill unless you are prepared to die.[45] Now, we need to be careful how we interpret this statement. Walzer is saying that political leaders cannot send soldiers to kill, unless they are also prepared to risk the lives of those soldiers.[46] That is clearly intended as a moral claim, since as a statement of fact it is simply false. But morally speaking it

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[43] Singer similarly suggests an institutional solution. He suggests there could be some sort of formal 'sign-off' system to establish who is responsible for any harms caused by an autonomous system at each and any stage of its existence. This could extend from designer/maker/programmer at the manufacturing stage, through to officers in the field for the actions on any particular operation. He is calling for an institutionalised chain of accountability. Singer op. cit. pp 410-411

[44] M. Walzer, "Kosovo," in M. Walzer *Arguing About War* (New Haven and London: Yale University Press, 2004), 99-103.

[45] Ibid. p 101.

[46] The first 'you' refers to the leaders, the second to the soldiers.

is dubious too. To take a domestic example, in the British police force a senior officer can authorise the deployment of specially trained officers carrying firearms.[47] Moreover, these officers are permitted to use lethal force where it is considered necessary to avert an immediate risk to the lives of themselves or others.[48] They are being deployed, by the senior officer, with a permission to kill.

Suppose now that this armed officer has to deal with a criminal wielding a handgun, who is posing a credible threat to the lives of others. The police officer could put herself at risk by, for example, trying to get close enough to the criminal to use her handgun effectively. Or, the officer could keep a distance, perhaps hiding behind cover, and use a weapon effective at longer range (a rifle). The officer is not obliged[49] to put herself at equal risk by using the handgun, and she is not prohibited from reducing the risk to herself by using the rifle from a distance. However, it would be wrong[50] for her to use the rifle from a distance if the armed criminal were surrounded by innocent bystanders and they were all at such a proximity that shooting would endanger them. In this scenario it is likely that her intentions would not be realised while harms to innocents could be foreseen.

Before drawing conclusions regarding war, we ought to acknowledge some disanalogies in the example. In the domestic case, the criminal's status as a culpable threat of unjustified harm is sufficient to render him liable to defensive force. In the risk-removal-in-war case, when soldiers use remote tactics the enemy they target may present no immediate threat at all. Further, if that enemy is made up of conscript soldiers, those soldiers may not be morally at fault for their

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[47] Manual of Guidance on the Management, Command and Deployment of Armed Officers (2009), 4.24, p 49. http://www.npia.police.uk/en/docs/MCD_Armed_Officers_Gen3_100709.pdf (accessed 30/7/10).
[48] Ibid. 1.31 p 14, and 2.45 p 28.
[49] Neither in the public rules nor, I contend, morally.
[50] Both morally, and in the rules; see Manual of Guidance... Armed Officers op. cit. 2.2 p 22, and 2.5 p 28 for example.

situation. But attacking them is still permissible in the public rules (in a way that would not be so in a domestic case) provided that proportionality and necessity constraints are met.

We can now see what is at issue in Walzer's condemnation of high-altitude bombing. It is that this action foreseeably failed to achieve its (presumably justifiable in the public rules) aim and was therefore causing unnecessary harm, and caused collateral harm unjustifiable in those public rules; and these problems arose because of risk-removal tactics. But the connection between risk-removal and violation of *jus in bello* (unnecessary harm and disproportionate collateral harm) is contingent. It is not the risk-removal itself that is morally wrong; risk-removal is wrong when it foreseeably entails violations of proportionality, necessity or discrimination constraints.

Moral Symmetry and Asymmetric Risk.

I have argued that for Killmister's example the root of the problem in the example as it is set up is that the state using remote weaponry is waging an unjust war. With Sparrow's scenario, the weapons system is unable to discriminate between legitimate and illegitimate targets. And for Walzer there is a connection between removal of risk and violation of *jus in bello*, but I have claimed that this is contingent (as it is with Sparrow).

If the contingent connection between the violation of rights[51] and modern weapons systems that remove risk is predictable and foreseeable, then that would be a reason at the level of public rule formulation to proscribe such systems. Note now that this argument is not concerned with the morality of risk-removal in itself;

[51] Those rights that the laws of war are meant to protect, the violation of which is contrary to elementary considerations of humanity. See Appendix 2.

rather, the moral justification for proscribing risk-removal would be minimising violations of noncombatant immunity and other established constraints on conduct in war. And it is worth noting that historically the connection between risk-removal (or risk-reduction) and violation of these rights is not that deep-seated;[52] unless of course that we can show that risk-removal itself constitutes a rights violation.

Risk-removal is not prohibited in public rules, so what is at stake (if anything) must be a moral right that those rules are intended to protect. If the moral right of combatants to use lethal force is dependent on their also being the target of lethal force, then by asymmetrically removing risk they lose the (moral) right to kill, and so any use of lethal force by them would be a rights violation. If that were the case, it would be a *prima facie* reason to consider a prohibition on risk-removal in the public rules. I will argue in the following that it is not the case that the (moral) right to kill in war is dependent on the possessor of that right putting themselves at risk of death.

Walzer gives a classic statement of moral symmetry. He talks of the 'moral equality of soldiers' that is grounded in their situation; '[t]hey can try to kill me, and I can try to kill them'.[53] The moral argument focuses on a theory of forfeiture or exchange of rights.[54] By becoming combatants, persons lose their right to life and liberty, but they 'gain war rights as combatants and potential prisoners'.[55] The reasoning underlying the moral symmetry of all combatants in this conception is the mutual risk faced by all those who don a uniform.[56] But if a military power

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[52] Use of bows and arrows, gunpowder, tanks, etc.
[53] M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 2002 3rd edn), 36.
[54] Ibid. pp 34 – 36.
[55] Ibid. p 136.
[56] Luban, op.cit. p 177.

adopts tactics that removes (or substantially reduces) risk to their combatants this symmetry is lost.

Suppose that Walzer's analysis is correct and that soldiers gain the right to kill but also forfeit their right not to be a target. So the fact that some combatants use technology in order to reduce or remove risk for themselves does not alter the moral claim that by participating in armed conflict they become legitimate targets. But then, when Walzer criticises high-altitude bombing with the refrain that these persons can't be sent to kill unless they are also prepared to die, he is confusing differing moral claims. Morally, we can't grant soldiers the right to kill without also accepting that they are legitimate targets. It does not then follow that when soldiers do kill, they are obliged to give the enemy a fair chance at killing them instead. Their enemy has the right to target them, but these soldiers have no obligation to provide them with the opportunity to exercise that right.

Walzer's confusion might be arising from equivocation of the term 'right', so it is worth analysing this further. He says that combatants gain the right (the liberty) to kill but lose the right not to be killed. The loss of this right means that enemy combatants have the right to target them, and Walzer seems to be treating this latter right as a claim-right. However if we analyse the 'rights forfeiture' model more closely, it does not automatically follow that there is any such claim-right. A noncombatant X has an immunity from attack, and others (combatants and noncombatants) have a duty not to attack X. By becoming a combatant, X loses this immunity and other combatants have a liberty to target them. But this is consistent with X retaining the liberty to prevent the enemy from targeting or attacking them; thus enemy combatants have a liberty to attack X but no claim against X such that X allows the enemy to attack him. Here, we could borrow

Benbaji's 'weak permissibility';[57] the enemy combatants are permitted to attack X, but X is permitted to prevent that attack.

Conclusion.

Walzer states, and Luban affirms that combatants have a 'moral equality'. This means that regardless of whether they are fighting for a just or unjust cause they have an equal right to kill and forfeit their right not to be the target of lethal force. Both authors claim that this equality is grounded in mutual risk. I have not been able to find any argument that grounds moral equality in mutual risk. If there is no argument, then asymmetric removal of risk in itself does not change the moral position of combatants. The mere fact that some combatants use technology to render themselves invulnerable does not mean they no longer have a right to use lethal force directed at other combatants. This applies to a knight in a suit of armour, an archer firing at a distant target, a tank driver, or a commanding officer ordering use of autonomous drones. The most cogent arguments against remote weapons systems or other means of risk removal are consequentialist, concerning violations of established prohibitions, not a deontological argument grounding the moral symmetry of combatants in mutual risk.

I conclude therefore that mere asymmetric risk-removal is not in itself a problem for Just War theory. That issue deflects attention from the crucial question for public rules governing conflict; do the weapons systems and means of deployment violate established principles of discrimination, necessity and proportionality? I have argued that the problem arising with high-altitude bombing, drones, Killmister's state with its 'back to the wall' and Sparrow's killer robots examples is

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[57] Y. Benbaji, "A Defense of the Traditional War Convention," *Ethics* 118 (2008): 474. Though his first use is in the context of moral permissibility, his application to chess, boxing and the 'war convention' demonstrates its appropriateness in the analysis of public rules.

that they all involve violation of noncombatants rights. I suggested that high-altitude bombing and long-range missiles could be added to Rodin's list of asymmetric tactics due to their (contingent connection with) negligence and recklessness regarding noncombatant immunity - a subversion of *jus in bello* constraints.

As the arguments above have drawn on the concept of *jus ad bellum* and more specifically the justification of the resort to armed force, I now turn to the issues of what conditions trigger the right to resort to force, and who has this right.

6. SELF-DETERMINATION, WELLBEING, AND THREATS OF HARM.[1]

In Chapters 6 to 9 I will deal with the war decision. Against a background prohibition on use of force, I set out what conditions could make resort to armed force justifiable or in some cases obligatory. With reference to the Just War requirements and constraints, Chapter 9 addresses the legitimate authority requirement; Chapter 8 deals with last resort; right intention is discussed in Chapter 7, and proportionality in Chapter 6. The key Just War requirement of just cause is the topic of Chapter 7 (military humanitarian intervention) and the current chapter (national defence).

In Chapters 1 and 2 I claimed that the right to national defence in international law is not justified by appeal to rule consequentialism. More plausibly, it is grounded in a straightforward deontological right to self-defence. However, in his 'War & Self-Defense',[2] Rodin argues that the right of national defence as conceived in international law cannot be grounded in a right of personal or individual self-defence. This chapter presents a critique of Rodin's rejection of the 'reductive strategy'. I will argue that his arguments do not show that a right of national defence cannot be grounded in the end of defending individuals, and that this end can ground a right of national defence.[3]

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[1] Antony Lamb, "Self-determination, Wellbeing, and Threats of Harm," *Journal of Applied Philosophy* 25(2) (2008): 145 – 158.

[2] D. Rodin, *War & Self-Defense* (Oxford, OUP, 2002).

[3] We will see, though, that my argument will suggest a change to the current international law. So there is a methodological difference between my argument and Rodin's. Rodin argues that a right of self-defence cannot justify the right of national defence as conceived in International law and so rejects it as the moral grounds of that law. I argue that it can justify that law, but the argument entails that the law should be extended to non-state communities. Thus I move back and forth between international law and the moral justification of that law in a process of reflective equilibrium. There is no contradiction between this methodology, and rejecting a rule-consequentialist justification of the laws regarding national defence because the law cannot be so justified (as I did in Chapter 1). The difference is that self-defence justifies the current law (which the rule-consequentialism could not), but then recommends extending the application of that law.

Rodin presents his 'Bloodless Invasion' arguments to show that there could be a legal right of national defence even when there is no threat to the lives of individuals; therefore the moral grounds of the legal right cannot be derived from individuals' right of self-defence. I will argue for plausible alternative analyses of these examples. In his first type of 'bloodless invasion' it is questionable whether the legal right of defence would be morally justifiable.[4] In his second type of bloodless invasion lethal defensive force could be a proportionate response to the threat to individuals, thus grounding a right to national defence. My argument will turn on the claim that while it my be the case that there is a legal right of national defence where there is no threat to lives, it does not follow that the legal right to national defence cannot be explained in terms of a moral right of individual self-defence.

The 'Bloodless Invasion' Arguments.

One of the central ideas of the Just War tradition is that the decision to use lethal armed force can be justified by appeal to a right of national defence. The grounding of this right is, in this tradition, explained by reference to an individual's right to self-defence.[5] The aim of Rodin's book is to give a substantive account of the right of national defence as conceived in international law, and argue for a negative conclusion: reference to individuals' rights of self-defence cannot explain or morally ground this right of national defence.

Rodin asks: who or what is the subject of the right to national defence? State, or individual?[6] In the same way, he asks if the state or the individual is the object of

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[4] And if it is justifiable, the right is grounded in the end of defending individuals' wellbeing.
[5] The 'domestic analogy', M. Walzer, *Just and Unjust Wars* (New York: Basic Books, 3rd edn. 2002), 58.
[6] Rodin 2002, pp 122 – 123. 'State' appears to be used here to stand for 'state or community' (p 123), or 'super-personal collective entity' (p122). Later, in my analysis of the 'humanitarian

the right, and whether the state or individual is the end of the right (that which is to be defended).[7] He focuses on this last question, and argues that neither the reductive strategy (the individual as the end of the right) nor the strategy of analogy[8] (the state as the end) can generate the right to wage war as conceived in international law.

According to Rodin, the strategy of analogy cannot ground the right because no interpretation of the 'common life'[9] gives it a value the defence of which can generate a right of national defence for the state. In my account, I will argue that defending the 'common life' can justify lethal force, but that it is worth defending because of the contribution to the wellbeing of individuals. I will not argue for a strategy of analogy.

Rodin draws on two 'Bloodless Invasion' examples to argue that the reductive strategy cannot ground the right of national defence because defending lives is not necessary for use of military force to be permitted in international law.

The first argument, which I will call Bloodless Invasion 1,[10] supposes that state D sends armed forces into some remote uninhabited territory of state N, the invasion presenting no threat to the lives of any N persons. Suppose also that this territory is resource poor and not vital to anyone's interests. This would be a violation of territorial integrity triggering a legal right to armed response. According to UN Charter Article 51 'Nothing in the present Charter shall impair the inherent right of

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intervention' argument, the distinction between the state and the community (the 'encompassing group') will be crucial.

[7] Ibid. p 124.

[8] Ibid. p 123. 'Strategy of analogy' because the right of national defence is grounded in an analogy with individual rights of self-defence. The analogy may be drawn to ground the state as the subject, object or end of the right.

[9] Ibid. pp 141 – 162. Rodin considers interpreting the 'common life' in terms of political association, the character of common lives, and communal integrity and self-determination. I will say more about national self-determination below.

[10] Ibid. p 132.

individual or collective self-defence if an armed attack occurs against a member of the United Nations'.[11] Armed attack is linked to aggression: 'Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the charter of the United Nations'.[12] The combination of use of armed force plus violation of sovereignty, territorial integrity or political independence triggers the right of self-defence in international law.

Rodin presents Bloodless Invasion 1 as a counterexample to the attempt to morally justify the legal use of lethal military defensive force by appeal to the defence of citizens' lives. But, we can further ask, would armed response by N be morally justified at all? If N took military action, it would be unrealistic to claim in advance that the extent of the conflict would somehow be limited to precisely that amount of harm necessary for the restoration of territorial integrity.[13] When states deploy military forces against each other, the dynamics of conflicts are prone to escalation. For this reason, if N used its army to end D's occupation, we must assume it is war.

Now, any reasonable account of the justifiability of waging war ought to take account of proportionality. So we need to determine whether war is a proportionate response to D's aggression. We have the difficulty of weighing incommensurables: human lives and the rights over territory. But if we compare with actions of individual persons, incommensurability alone does not prevent us reaching a judgment. For example, killing someone who attempts to steal your car is not a

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[11] Ibid. p 105.
[12] Ibid. p 109. United Nation Consensus Definition of Aggression (1974) Article 1(1). Also see the 2010 'Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression' for a detailed list of acts that qualify as acts of aggression, http://www.icc-cpi.int/Menus/ASP/ReviewConference/Crime+of+Aggression.htm (accessed 7/7/10).
[13] For example, to remove D's forces that are currently occupying N territory.

proportionate response; the level of defensive force used is disproportionate to the value of the end defended. In the same way, for state N a proportionality constraint considers whether the harms that result from war would be warranted by the value of sovereignty over the threatened territory. Since the example supposes it to be resource-poor and previously unoccupied, we can at least question the proportionality of war.[14]

We could appeal to consequentialist considerations to argue that N would be justified in waging war over this piece of unoccupied territory on the grounds that it may deter D (or other states) from undertaking future invasions. But deterrence is by no means certain, and consideration of consequences may well convince us that not waging war is the better response (for example, as with the international reaction to the Soviet Union's 1968 invasion of Czechoslovakia).

The divergence of legal rights and moral justifiability of waging war can be explained by the different interpretations of the proportionality constraint. Rodin observes that the law always assumes war is a proportionate response to unlawful force threatening sovereignty or territorial integrity. This is at least in part due to the International Court of Justice's interpretation of proportionality, requiring the balancing of the force of the defender with the force deployed by the attacker.[15] By contrast, a judgment of the moral justifiability of waging war ought to weigh harms inflicted in war with the value of what is being defended. Judgments could

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[14] There is no inconsistency in the claim that, on the one hand, rules concerning conduct in war require that combatants do not consider rule-breaking because the task of predicting consequences would be too onerous, while on the other hand, rules governing resort to force ought to require political leaders to attempt to weigh the consequences of action and inaction, however difficult that may be. The two types of case are importantly different. The reason for following the *jus in bello* rules is that individuals are not very good at judging what would be the optimal outcome with respect to reducing rights violations in situations of uncertainty, high complexity and high stakes. In *jus ad bellum* proportionality, we are not requiring a positive judgment that the acts would lead to the optimal outcome; rather, that the value of that which would be defended is considered sufficiently great to warrant the risk of harms inflicted in war.

[15] Rodin 2002, pp 114-5.

therefore diverge in cases such as Rodin's Bloodless Invasion 1 where military force would be needed to counter the attacker, but the end defended may not justify the harms of war. This need not necessarily mean that the aggressor state 'gets away with it'. Appeal could be made to international authority such as the UN, and measures such as economic sanctions could be targeted at the aggressor. Suitably proportioned to outweigh any benefit the aggressor would get from annexing the territory, sanctions[16] could also act as a deterrent to potential future aggressors.

To sum up, while Bloodless Invasion 1 shows that in current international law the right to resort to arms does not depend on a threat to the lives of individuals, if we think that war would not be a proportionate response, then we can at least question whether war ought to be permissible.

An example of Rodin's second type of bloodless invasion[17] is as follows: suppose the government of state D deployed a massive and heavily armoured force to invade the territory of neighbouring state N, with instructions to shoot at N persons only if absolutely necessary to defend themselves, and only if N persons shoot first. Moreover, N has a small, ill-equipped army who would be able to lay down their arms and not resist D's overwhelming invasion. In these circumstances N persons' lives are not at risk, but lethal force to resist invasion would be legally justified. Thus the end of defending lives is not necessary for there to be a legal right of national defence; so the end of defending individuals' lives cannot ground the right of national defence as conceived in international law. I will call this Bloodless Invasion 2.

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[16] Subject to the same limits of proportionality as use of defensive force.
[17] Op. cit. p 132.

Before we go on - and this is crucial to my argument - note Rodin's slippage from 'self-defence' (which may be to resist non-lethal threats) to 'defending lives' in the Bloodless Invasion argument. Rodin discusses non-lethal threats in the context of rights of individuals.[18] We are to bear in mind that there may be a right to use lethal force to defend against certain non-lethal threats ('significant non-lethal bodily harms and enslavement'[19]) and henceforth discussions of 'lethal aggression' and 'defending lives' are to encompass these cases also. However, he specifically rejects on the grounds of proportionality the idea that lethal defensive force can be a justifiable response to threats to some important political freedoms.[20] In the following, (a) I take the examples to be concerned with 'self-defence', rather than the narrower 'defending lives'. This is justifiable because Rodin's argument is 'to show that the right of national self-defense cannot be explained in terms of personal self-defense'.[21] And (b), I take a closer look at proportionality of lethal defensive force countering threats of non-lethal harm, and argue that threats to certain political freedoms are threats of harm of sufficient gravity to warrant defensive force.

Judgments of the proportionality of self-defensive force[22] weigh the harm threatened by the aggressor and the defensive force used to counter the threat. Uncontroversially, lethal defensive force would be a proportionate response to an imminent threat of lethal harm, and would not be a proportionate response to a threat of a kick on the shin.

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[18] Ibid. pp 43 - 48.
[19] Ibid. p 48.
[20] Freedoms 'such as the right to vote or freely express your opinions' p 48.
[21] Op. cit. p 5.
[22] Of course, if N resists, it will cease to be a bloodless invasion. But this is not to reject the terms of Rodin's example. We can legitimately ask whether resistance could be morally justifiable against an invasion that would, if resistance were not offered, be bloodless. In the following, I will continue to use the term Bloodless Invasions, understood in the way just explained.

Rodin's examples indicate parameters for judging the level of justifiable defensive force. Lethal defensive force could be proportionate against threats of 'significant non-lethal bodily harms and enslavement',[23] which would leave the defender with an unacceptably low level of wellbeing over a significant period of time. So we could say that the harm threatened should be weighed in terms of the level and duration of reduced level of wellbeing of the victim, if the threat were carried out.

But this is not right, because now the proportionality of defensive force seems to depend on the resilience or fragility of the target of the threat. The more stoic the target, the less they would be harmed by the threat (the resulting level of wellbeing not as low, or for a shorter duration), and so the level of defensive force that could be judged proportionate would be lower. For example, suppose aggressor A attacks innocent persons B and C with the intention of bodily mutilation such as cutting off a limb. And suppose stoic B would bounce back from the injury and soon achieve a decent level of wellbeing, but C would struggle with the loss and suffer for a long time. On the account so far, C would be justified in using a greater degree of defensive force than would B, which is clearly wrong. To avoid this problem the judgment of proportionality ought to weigh the typical harm that would result from a threat of this type. For example, lethal defensive force could be proportionate to resist a threat of a type that would cause significant injury (loss of a limb), because of the effect on wellbeing that would typically follow such an injury.[24]

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[23] See note 20.

[24] So far I have considered *threats* of non-lethal harm. Where a culpable agent's current continuing actions cause harm, it may be permissible to use lethal force. An example would be killing a culpable slavemaster in order to escape. In this case proportionality ought to weigh that lethal force against the current harm – that is, the typical level of wellbeing that results from this type of action, and the likely future duration of the ordeal.

This account of harm and proportionality could justify lethal force by soldiers defending against 'Bloodless Invasion 2' if they could reasonably suppose that military invasions typically entail harm proportionate to the use of lethal defensive force.[25] If this were so, N persons could reasonably consider themselves facing culpable aggressors threatening harm against which lethal defensive force is justifiable.[26]

An immediate problem for this response to Bloodless Invasion 2 is how N persons could judge the impact of this invasion of this type on their level of wellbeing. Furthermore, how do they judge what type of invasion it is? Some such invasions may be a precursor to persecution of the inhabitants of the invaded territory, but not always. Perhaps N persons could look to D's past record of invasions to see how they treat conquered nations. However, even if these epistemological worries can be resolved, we can identify further problem cases for this 'harm' account.

More 'Bloodless Invasion' Arguments.

The following examples that bring the problem into focus are variants of the bloodless invasion idea. First, Bloodless Invasion 3: suppose the aggressor state deploys overwhelming invading forces, with orders not to shoot except with minimum force for self-defence if shot at. They intend to impose a government that would bring about an improvement in the overall wellbeing of each person of the target state. Furthermore, this could (somehow) be known by all parties. On the account given so far, grounding the right of national defence in the end of

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[25] A further worry is that defensive force would not meet the 'reasonable prospect of success' requirement explicit in *jus ad bellum* and implicit in individual acts of self-defence (see D. Statman, "On the Success Condition for Legitimate Self-Defense," *Ethics* 118 (2008): 659-686). However, Statman argues that a community fighting for its honour could meet this condition even if it foreseeably would not win the war (because success could be measured in terms of defending honour, not winning the war) (pp 684-685).

[26] For the same reason, it could give an account of the justification of noncombatants becoming irregular combatants (or becoming regular combatants) to resist a more conventional invasion, in conditions where if they had not done so they would face no lethal threat (because the invading forces only shoot at combatants).

proportionate defence of the lives or wellbeing of individuals would not justify lethal defensive force in Bloodless Invasion 3.

Armed resistance to Bloodless Invasion 3 could be justified either (i) by a claim that the harm of the loss of individuals' political freedoms can outweigh any gains to wellbeing that the occupying forces bring about (and so denying that the overall wellbeing of persons in the target state does improve, in spite of the improvements brought about by the invading forces). Or (ii) we could make a separate case for these political freedoms as a justification for lethal force, not grounded in considerations of levels of wellbeing.

However, advocating reasons (i) or (ii) would raise a further problem. Imagine two neighbouring states, one a liberal society LS, the other a hierarchical society HS.[27] In HS, rights to security and subsistence are recognised and members of the community enjoy the substance of these rights (to the same degree we could reasonably expect the substance of these rights to be enjoyed in any society). However, only a minority of HS persons enjoy a range of political freedoms such as voting and holding political office. Furthermore, persons that lack these political freedoms have expressed a desire to have the right to vote or hold office, but their wishes have been rejected by those with political power. The government of LS decide they cannot tolerate this situation and launch a war against HS, with the aim of setting up elections for HS persons to elect their leaders democratically. If successful, the end result will be an increase in the rights enjoyed by HS persons.

If lethal force could be justifiable in Bloodless Invasion 3 for either reason (i) or (ii), then these same reasons could justify use of force by LS and hence the

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[27] For the idea of liberal, hierarchical and other types of domestic societies, see J. Rawls, *The Law of Peoples* (Cambridge Massachusetts: Harvard University Press, 2001), e.g. 59-77.

unjustifiability of defensive force by HS persons. If lethal force could be justifiable by HS, then this leads us to reject reasons (i) and (ii) and we do not yet have grounds to justify resistance to Bloodless Invasion 3. So on what grounds, if any, would resistance be justified by HS, and would this be consistent with justified lethal resistance against Bloodless Invasion 3?

Here, I introduce a new example, Bloodless Invasion 4. As with Bloodless Invasion 3 the overwhelming invading forces do not threaten the lives of the persons in the target state, provided they do not resist. The difference is that the invaders make it known that they intend to allow continued political freedoms of individuals (to vote for the government, for example) except that these are now to be exercised within the larger political entity – the aggressor state plus the colonised community. (That is, the threatened persons are to become members of the larger political community, in which all individuals enjoy political participation.) So what is at stake is the community's status as a self-governing political unit, and the capability to decide whether they are self-governing or part of a larger political entity - the self-determination of the political community.

We could explain the moral justifiability of lethal defensive force in Bloodless Invasion 4 by arguing that the threat to the self-government and self-determination of the political community is a threat to the wellbeing of the individual members of the community. That is, it is a threat to control of the political environment, the capability for justice, the social bases of self-respect and non-humiliation,[28] of

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[28] See M. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2000), 78. Also, Baker draws on Nussbaum's list of capabilities in order to ground a justification of national-defence. (D-P. Baker, "Defending the Common Life: National-Defence After Rodin," *Journal of Applied Philosophy* 23(3) (2006): 259-275.) His account is a response to Rodin's rejection of defence of the common life as a justification for waging war. The list of capabilities is presented as essentially human functions, which can only be worked out through the common life. Baker's claim is that 'human selfhood' is bound up with membership of our communities, and a threat to the common life is thus a threat to the person, not merely a threat to the person's

sufficient gravity to warrant lethal force as a proportionate response. Thus the 'harm' theory could account for a judgement that lethal resistance to Bloodless Invasion 4 could be justified.[29]

This solution raises some important questions. We are exploring the reductive strategy – grounding a moral justification of a right of national defence in the end of defending the lives and wellbeing of individuals. Yet I am now appealing to a property of the group – self-government and self-determination of the political community. Is this consistent with the individualistic project?

I will argue that use of lethal force to defend the 'group' or 'collective right' is justified by appeal to the contribution of self-government and collective self-determination to the wellbeing of members of the group. The end of the right of defence is the wellbeing of individuals in the target group. The justification for defending the value or property of the collective is its importance for the wellbeing of those individuals. Thus for moral individualism in this justificatory sense, 'all justifications for ascriptions of moral and legal rights (and duties) must be grounded *ultimately* on consideration of the wellbeing and freedom of individuals'.[30] However, this does not commit to any claim that all properties of the collective are reducible to properties of individuals. 'Justificatory individualism is compatible with the view that groups are 'real' – that not all the properties of

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wellbeing. In contrast with Baker's account, my use of Nussbaum's list does not require adherence to a controversial ontological theory of selfhood; merely recognition that threats to a capability or functioning is a threat of harm, and the absence can ground a claim of need.

[29] In working out the theory for practical application, some limits would need to be specified for the harm and well-being account. For example, resorting to war to maintain economic status ought not to be permitted, even when not doing so would entail reduction of wellbeing.

[30] A. Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: OUP, 2004), 413; emphasis in original.

groups can be reduced to the properties of individuals who are members of the groups.'[31]

So we now need to support the following claim: the threat to self-government and self-determination presented by Bloodless Invasion 4 would be a significant non-lethal threat to the wellbeing of members of the target political community, of sufficient gravity to warrant lethal defensive force.[32]

The Value of Collective Self-Determination.

Margalit and Raz[33] identify six features of groups that are relevant when identifying political communities for whom self-government and self-determination would contribute to the wellbeing of its members. Members of these groups share a common culture and character, individuals growing up in the community acquire the group culture, membership is by mutual recognition, is a matter of belonging, not achievement, and is the prime way in which members are identified. Finally, they are not small 'face to face' personal groups, but are larger 'anonymous' groups.

Such groups are 'encompassing groups'. Through their membership of and identification with encompassing groups, individuals find networks of social relations and opportunities in their families, careers, and leisure and cultural activities all of which make a vital contribution to their wellbeing. Margalit and Raz make the stronger claim that not only do such groups facilitate satisfaction of goals, but those goals themselves are products of membership and identification

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[31] Ibid. p 413.
[32] Seamus Miller agrees that a right to self-determination is a candidate for inclusion in the group of rights the defence of which justifies use of lethal force. S. Miller, "Civilian Immunity and Collective Responsibility," In *Civilian Immunity in War*, ed. I. Primoratz (OUP: Oxford, 2007), 116.
[33] A. Margalit and J. Raz, "National Self-Determination" *The Journal of Philosophy* 87(9) (1990): 439-461.

with the group. Membership of the encompassing group in an important sense determines our preferences the satisfaction of which constitutes individual wellbeing.

There is also a strong tie between the wellbeing of individuals, and the prosperity and self-respect of the encompassing group to which they belong. And at least in some cases, that collective prosperity and self-respect will depend on or be enhanced by self-government of the group.[34]

Thus if an aggressor state threatens the self-government or self-determination of a political community, a substantial part of which is an encompassing group, then this threat to the collective could be a threat to the wellbeing of individual members of the community. If the encompassing group welcome colonisation, it is not a threat to their wellbeing. If they wish to remain self-governing, it is a threat of harm. This highlights that the capability of the collective to determine its own political status also contributes to the wellbeing of individuals. A threat to the capability of collective self-determination is a threat of harm to individuals.

So when the targeted community wishes to remain self-governing – or at least do not want the aggressor state to determine the political future of the community - then proportionate defensive force could be justifiable. If lethal force could be a proportionate response to this threat to the wellbeing of individuals, then the

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[34] We should note that Laitin challenges this view, in D.D. Laitin, *Nations States and Violence* (Oxford: OUP, 2007). He defines a nation as a 'population with a coordinated set of beliefs about their cultural identities... whose representatives claim ownership of a state (or at least an autonomous region within a state) for them by dint of that coordination' (p. 49-41). The homogeneity that results from commensurate state and nation yields benefits of social solidarity and hence further public goods. But, he argues, the cost of achieving an ethnically homogeneous political community may be unacceptably high (pp 107-108). Hence at least in some cases cultural heterogeneity within the boundaries of the state may be preferable.

reductive strategy approach can justify lethal defensive force to Bloodless Invasion 4.

However, in some cases, it may be the case that the harm threatened from the loss of collective self-determination could be outweighed by benefits resulting from the invasion, such as for example emancipation of women. If we judged this to be the case, the 'harm' account would not justify lethal resistance in Bloodless Invasion 4 and so would be out of step with consensus on conditions that justify war. However, this response lowers the threshold for conditions under which one state can interfere with another - by use of armed forces if necessary; it permits states to violate territorial integrity and sovereignty of other states if they reasonably suppose that by so doing they can improve the overall wellbeing of persons in the target state. Embodying in international law principles that permit overriding the collective self-determination of an encompassing group wherever it is calculated that this could bring about, on balance, an improvement in the wellbeing of individuals in the target group, would lead to chaos. Lowering the threshold for permissible use of force in this way would foreseeably reduce the wellbeing of individuals.

So when identifying the sorts of rights that ought to be embodied in international law,[35] we are justified in giving extra weight to the value of self-government and self-determination because of the foreseeable harm that would result from not doing so. For example, we might judge that in the particular case of Bloodless Invasion 4 the wellbeing of the colonised community would be improved post-invasion because, say, the benefit from the introduction of same-sex legal

[35] Buchanan distinguishes between what is morally right on a given occasion, and international institutional morality - prescriptions for international law. A. Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26(1) (1997): 32.

partnerships would more than compensate for the loss of collective self-determination. But when we consider whether such invasions should be permissible in international law, we ought to take into account the foreseeable consequences of permitting invasions wherever some improvement in wellbeing could result. The impact of such a law on the wellbeing of individuals would be, predictably, catastrophic. Morally speaking, Bloodless Invasion 4 ought to be legally prohibited, and so defensive force justifiable.

If the 'self-government and harm' explanation accounts for justifiable resistance to Bloodless Invasion 4, then the same considerations resolve the problems with Bloodless Invasion 3 and the example of Liberal Democracy and Hierarchical Society. In Bloodless Invasion 3, the invading forces would be a threat to wellbeing because they threaten the capabilities of self-government and self-determination, and so would be legitimate targets for proportionate force. The citizens of Hierarchical Society could use proportionate force to resist interference by Liberal Society, as the latter is a threat to the former's capability of self-determination. Finally, this account could justify lethal defensive force in Rodin's Bloodless Invasion 2 example.

Three recent writers agree with my conclusion. Uniacke[36] argues that it may be permissible to use self-defensive force (i) against coercion even when that coercion would have beneficial effects, and (ii) to defend freedoms. Luban[37] also argues that the right to use lethal force ought not be restricted to defence against serious physical threat. In the domestic case, use of lethal defensive force against threats to property and threats to political freedoms would not be proportionate,

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[36] Suzanne Uniacke: "Getting One's Retaliation in First," in *Preemption: Military Action and Moral Justification*, eds. H. Shue and D. Rodin, (Oxford: Oxford University Press, 2007), 78.
[37] David Luban: "Preventive War and Human Rights," in Shue and Rodin 2007, 183-4.

and would not be necessary because there is recourse to law enforcement agencies. But in the international case, threats to property can be a threat to survival, and threats to political freedom can result in consolidating a despotic regime that murders or imprisons any opposition. Luban argues that defence of these basic rights can justify lethal defensive force. Finally, Sinnott-Armstrong[38] cites Crawford's claim that preemption in self-defence should be limited to threats to life and health. He counters this by arguing that if defending freedom does not justify self-defensive force, then 'it would be morally wrong to stop invaders who promised to keep us alive and healthy while taking over our government', which is surely wrong.

Rodin introduces the Bloodless Invasion arguments to show that the right of national defence cannot be grounded in the end of defending the lives of individuals; they show that defending the lives of individuals is not necessary for the right to wage war. But my account shows that Rodin reaches the wrong conclusion with his Bloodless Invasion 2; lethal force could be morally justifiable to resist the threat of non-lethal harm to individuals, hence the legal right of national defence can be grounded in personal defence.

The 'Humanitarian Intervention' Argument.

Rodin's second critique of the reductive strategy is that having the end of defending the lives of individuals is not a sufficient condition for military action to be legitimate national defence. Trivially, if humanitarian intervention is justified on the grounds that it protects the wellbeing of individuals, and since humanitarian intervention is not an example of the exercise of national defence, then not all examples of military force used to protect the wellbeing of individuals are

[38] Walter Sinnott-Armstrong: "Preventive War, What Is It Good For?" in Shue and Rodin 2007, 214-5.

examples of national defence. More interestingly, he says that cases of humanitarian intervention show that there is deep tension between protecting the lives or wellbeing of individuals, and the right of national defence.[39]

Rodin's Humanitarian Intervention argument[40] runs as follows: If humanitarian intervention and national defence were justified on the same grounds (protecting the wellbeing of individuals), then the following argument should hold. State B attacks the citizens of state A. In this case, state A has the right to use defensive force against B in order to defend against the threat to A citizens. But also state C has the right to use force against B; that is, to intervene in B's affairs without having to ask its permission, in order to protect the wellbeing of A citizens. Now, suppose state A uses lethal force against its own citizens; and suppose state C considers using force against state A, to prevent harm to A's citizens. The point here is that if C is justified in using military action on the grounds that doing so defends the lives of A citizens, then morally it should not make any difference whether it is state A or state B who threatens those citizens.

But this is not right, argues Rodin. It does make a difference whether A citizens are threatened by state B or state A. In the latter case, A's right of national defence is one of the factors to be weighed against the case for intervention. Therefore, concludes Rodin, intervention and national defence cannot be derived from the same grounds, and so national defence cannot be grounded in the end of protecting the wellbeing of individuals.

I have two objections to this argument. First, Rodin refers to the UN's condemnation of Vietnam's intervention in Kampuchea in order to show that even though Vietnam was acting in order to protect lives of Kampuchean people, the

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[39] Rodin 2002, p 131.
[40] Ibid. p 131.

action was a breach of the rights of the state of Kampuchea. He then goes on to conclude that if there is a right to humanitarian intervention, then 'the moral basis of the right of national defence can in certain circumstances be justly overridden'.[41] But the moral conclusion follows from the legal premise only if we assume the legal premise is morally justified. We should recall the above claim that morally, because of the high risk of harm that would ensue if it were not the case, all nations ought to have a legal right of defence even against invaders who would improve wellbeing. That may be so, but if this right could never be forfeited, rendering the territory liable to justified intervention, the costs in terms of human suffering could also be high. So the institutional argument for the right of national defence will ground a moral right that can be forfeited, and a legal right that ought to be forfeited, when a threshold of harms to persons within the territory is reached. For the legal right to serve its purpose of reducing risk of harm resulting from a proliferation of interventions, the bar would need to be set high to limit intervention to special cases. Also for the same reason there must be some sort of institutional solution for determining whether the threshold is met; states cannot decide this unilaterally. Since the harms in Kampuchea had surpassed any reasonable threshold, the Vietnam/Kampuchea case study does not show conclusively that the latter state had a moral right of defence that could be weighed against the case for intervention.

Secondly, in his hypothetical intervention case, Rodin has distinguished between the citizens of A and state A, and then assumed that any (moral) right of national defence lies with the latter and not the former. We do not have to accept this analysis. In this case where there is violent conflict between the state ('a persisting

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[41] Ibid. p 131.

structure of institutions for the wielding of political power'[42]) and the people, with the state as the aggressor, then any moral right of lethal defensive force grounded in protecting the wellbeing of individuals would clearly lie with the people (the encompassing group) and not with those wielding political power. If the structure of institutions that constitute state A had a right to defence independent of considerations of the wellbeing of individuals, this would be forfeited by the unjustified aggression to the citizens of A.

My reductive account does not have a problem of justifying, on the same grounds, both the right of defence and the conditions under which it ought to be forfeited. Grounded in needs and threats of harm, the justification is protecting the wellbeing of individuals. If the harms occurring or threatened in an internal struggle were not sufficient to warrant the harms entailed by intervention, then there would be a right of defence against any outside intervention. Where harm entailed by intervention would be proportionate to the claims of need or harm threatened in the internal struggle, the (moral) right of defence would be forfeited.

Note that the value of self-government and self-determination for the wellbeing of an encompassing group may count on either side of this proportionality judgement. On the one hand, it may count against forfeiting the right of self-defence where prevention of rights violations necessitates interfering with the self-determination of a community. On the other hand it may count for forfeiture of the right of self-defence where the state oppresses a sub-state encompassing group fighting for self-determination and self-government.

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[42] Buchanan 2004, p 237.

Finally, as with the 'Bloodless Invasion' arguments, the embodiment of principles permitting humanitarian intervention in international law would need to take account of consequences of lowering the threshold for interference in other communities. Setting the bar too low, allowing intervention to prevent minor harms or threats, could result in greater harm to individuals by proliferating the use of armed force. I will return to this in the next chapter.

Objections to My Critique of Rodin.

A possible objection to the reductive strategy as outlined here is that it justifies too much. If self-determination and self-government contribute so much to wellbeing of individuals that they can justify armed resistance, then perhaps they could also ground a right to secession for *all* sub-state communities that fit the profile of an 'encompassing group', and who claim that the wellbeing of their members would improve if they achieved political independence. Note that this objection does not view colonisation and secession as 'two sides of the same coin'. The question is, do the grounds that justify armed resistance in the Bloodless Invasions also justify a unilateral primary right to secession.

First, we should note that the following argument is not valid:

Premise 1: The aim of defending X is a just cause.

Premise 2: This war has the aim of procuring X.

Conclusion: This war has a just cause.

The problem can be illustrated by comparison between defending and procuring a loaf of bread. Suppose we agree that, in a time of famine, harm H is justifiable to defend your last loaf of bread. Then from this it does not follow that, in a time of famine, harm H would be justifiable in order to procure a loaf of bread. We *may* judge that it would be justifiable, but this is not entailed by the judgement of

justifiable defensive harms. The difference between these judgements lies, at least in part, in a question of burden of proof. We presume that defending your last loaf is justifiable in order to prevent a violation of your rights. With procuring the loaf the presumption runs the other way, and the burden of proof is on the procurer to show their action is justified.

In the case of defending the capability of self-determination and self-government, the burden of proof would lie with any party that claimed that necessary and proportionate defensive force would not be justified. In the case of procuring those capabilities, the burden of proof lies with the would-be procurer to demonstrate that their actions are justified. And as with the 'loaf of bread' story, from my claim that defending collective self-determination would justify resort to armed force it does not follow that procuring self-determination would justify resort to armed force.

Nonetheless, restating the objection, if communities have such a strong interest in self-determination as I have claimed, then secession ought to be recognised as a right in international law for all such groups (and hence the consequences of embodying such a principle in public rules would be difficult to justify).

Buchanan[43] sets out some criteria for judging theories of secession. He distinguishes between two types of theories; Remedial Rights Only Theories allow secession only to remedy or in response to rights violations. For example, when state actions threaten the survival of the members of the community, or when sovereign territory has been seized by an aggressor state. In contrast, Primary Rights Theories can justify secession in the absence of such violations.

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[43] In A. Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26(1) (1997): 31-61.

Presumably, mere absence of self-determination for a sub-state community does not constitute a rights violation, otherwise all bids for secession would be remedial.

Buchanan then sets out some criteria for judging those theories. The theory has to have a 'significant prospect' of being implemented in international law. It must be minimally realistic, meaning that it should be consistent with well-entrenched, morally progressive principles of international law. If the theory were to be accepted in law, it should not encourage actions that undermine principles of morality or international law.[44] Finally, the theory should be morally accessible to a wide range of persons and have a cross-cultural appeal, and so should not require for example adherence to particular religious beliefs.[45] Judged by these criteria, Remedial Rights Only theories fare better than Primary Rights theories. So international law would do better recognising claims for secession only in remedial cases (in response to rights violations) rather than in primary cases (where it may merely be the case that a community claims - or is recognised - to have a (moral) right to self-determination).

So my claim regarding the value of self-determination for encompassing groups may lead us to recognise that interest as a moral right. But, drawing on Buchanan's institutional considerations, it does not follow that all such groups ought to be granted in international law the right to secession.

A second objection emerges if we apply, to my analysis of Bloodless Invasion 1, Buchanan's criterion that theories have to have a 'significant prospect' of being

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[44] For example, it should not encourage states to manipulate populations in order to prevent communities from realising the political conditions necessary for a claim for secession. These manipulations could include preventing sub-state communities from emerging, or to refraining from otherwise worthwhile decentralisation of power, See p 229 below for fuller treatment of this.

[45] There ought to be convergence on the principles underpinning the theory and so consensus on laws derived from it.

implemented in international law and must be consistent with well-entrenched, morally progressive principles of international law. The moral impermissibility of waging war over the disputed uninhabited land is not consistent with international law, and would be unlikely to be implemented in law. This leads to a third objection: If international law were not to permit lethal defensive force in cases such as Bloodless Invasion 1, this could foreseeably lead to chaos. Aggressor states launching invasions wherever they see the opportunity, and other states compelled to use valuable resources maintaining a presence in all their territory to ensure any potential invasion would pose a threat to individuals and thereby trigger a right to lethal defensive force.

However, since embodying in law the permissible use of lethal defensive force against invasions such as Bloodless Invasion 1 would prevent foreseeable harms to persons, this law could be grounded in the end of defending the wellbeing of individuals. Thus once we take into account the 'institutional' consideration, the reductive account of Bloodless Invasion 1 can meet Buchanan's criteria, and can also give moral grounds for the target state's right of defence as currently conceived in law.

I will consider now a final objection. Grounding a justification of use of lethal defensive force in the value of self-determination and self-government for members of encompassing groups generates a right of defence for encompassing groups, not states (and so is at odds with international law and the Just War tradition).

In response to this we should first note that any assumption[46] that the subject of the right of defence must be either the individual or the state oversimplifies the issue. As Rodin recognises,[47] an encompassing group may be co-extensive with the political community falling under the jurisdiction of the state, but it may also be a sub-section of this community. Alternatively, the encompassing group may be composed of citizens of two or more states.

I have argued that in response to rights violations or injustices, defence or procurement of the capability of self-determination and self-government of the encompassing group could be justified by appeal to the wellbeing of individual members (justificatory individualism). The account does not commit to either a claim that it is the individual or that it is the group that wields this right. But if we then think that viewing war as a number of individuals simultaneously wielding their right to use defensive force as implausible, then we ought to consider encompassing groups as the subject of the moral right.

So to this objection I reply that while states have a legal right to national defence and individuals have legal rights of self-defence, the picture is more complicated from a moral standpoint; encompassing groups can be the subject of moral rights of defence.[48] If this moral right were to have prospect of being institutionally embodied in law, then we need some agreed criteria or framework for identifying groups that can legitimately (morally) engage in acts of collective self-defence.

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[46] See for example Rodin 2002, p125.
[47] Ibid p158.
[48] Reichberg reports that 'on Grotius's account, legitimate war would not be restricted to relations between sovereign powers'. G. Reichberg, "Just War and Regular War: Competing Paradigms," in *Just and Unjust Warriors*, eds. D. Rodin and H. Shue (Oxford: OUP, 2008), 205.

Conclusions.

The aim of this chapter was to show that the right to wage war can be grounded in the end of defending individuals. The right that emerges from the argument leads to a revisionary account, moving back and forth between law and moral justification in a process of reflective equilibrium.

This gives us plausible alternative analyses of Rodin's Bloodless Invasion arguments. In the first, we can seriously raise the question of whether war would be a proportionate response, provided other means of persuasion were available (sanctions in some form). But whatever the judgment in any single case, moral concern for wellbeing of individuals could ground a legal prohibition on any such acts, backed by threat of lethal defensive force. In the second type of bloodless invasion, war could be a proportionate response to the threat to the wellbeing of individuals. Lethal force could be proportionate to defend the capability of the collective for self-government and self-determination, on the grounds of that capability's importance to the wellbeing of individuals. This strategy of justificatory individualism is consistent with the existence of properties of groups that are not reducible to properties of individuals.

The same grounds can justify use of armed force in both national defence and humanitarian intervention. However, this argument emphasises that the collective entities that are justified in defending with lethal force are not necessarily coextensive with sovereign states; they may be sub-state or inter-state communities. This raises the important question of legal recognition of such groups.

7. HUMANITARIAN INTERVENTION.

In the last chapter I introduced the idea of a right to engage in acts of humanitarian intervention. In this chapter, I argue that there is a duty to do so.

In December 2001, the International Commission on Intervention and State Sovereignty (ICISS) report argued that the international community has a responsibility to intervene where a state is failing to protect its own citizens.[1] In 2005 the UN World Summit agreed Outcome 138, that a state has a responsibility to protect its citizens against genocide, war crimes, ethnic cleansing and crimes against humanity.[2] Outcome 139 of the Summit agreed that if a state were not fulfilling the responsibility to protect its citizens, then the international community would have a responsibility to use diplomatic and peaceful means to protect them. Finally, the World Summit agreed a 'third pillar' of strategy; if peaceful means of help proved inadequate then the international community, through the UN, were prepared to take collective action in a 'timely and decisive manner'.[3]

Ban Ki-moon followed this up in 12 January 2009 with his report 'Implementing the Responsibility to Protect'. The aim there was to present some initial thoughts on how these 'three pillars' could be given 'doctrinal, policy and institutional life', and to find ways of implementing these decisions in a 'fully faithful and consistent manner'.[4] He was seeking to progress the responsibility to protect from concept to policy.

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[1] International Commission on Intervention and State Sovereignty Report of December 2001 paragraph 4.1 http://www.iciss.ca/report2-en.asp (accessed 1/11/09).
[2] Cited in United Nations, *Implementing the Responsibility to Protect: Report of the Secretary General* January 2009, p 4. http://globalr2p.org/pdf/SGR2PEng.pdf (accessed 14/4/10).
[3] Ibid. p 1.
[4] Ibid. p 4.

Where situations require timely and decisive action, consensus on action-governing public rules is essential. I argued in Chapter 1 that consensus on the laws requires convergence on the principles underpinning the law. So the ethical problem is not only to produce a moral argument for intervention. If intervention is justifiable, that argument must be formulated in a way that is as binding as possible on states. The aim here is to analyse and evaluate the argument that the moral basis of the 'third-pillar' of the 'responsibility to protect' – that is, the responsibility to take timely and decisive action – is a duty to rescue. The importance of grounding humanitarian intervention using armed force in a duty to rescue is that while the duty to protect is a special positive duty, the duty to rescue is a general positive duty.[5] If there is greater chance of convergence on a duty to rescue rather than a wider-ranging duty to protect, then my conclusion has practical advantages.[6]

The separation of the moral justification of the third pillar from the justification of the first two is essential because there may be a case for military intervention even if the broader Responsibility to Protect is rejected. Finally, in addition to these pragmatic advantages of the 'duty to rescue' approach, separating the case for military intervention from the essentially benevolent nature of the first two pillars clarifies what is at stake in the debate.[7]

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[5] The difference between these, and the importance of this distinction for the public rules, will be explained below.

[6] Bellamy argues that the indeterminacy inherent in the third pillar of the R2P has meant that it has not been, and is unlikely to be, effective as a 'catalyst for international action in response to genocide and mass atrocities'. A.J. Bellamy, "The Responsibility to Protect - Five Years On," *Ethics and International Affairs* 24(2) (2010): 166. Welsh and Banda likewise point out that the R2P has not resulted in timely action in humanitarian crises since 2005, and it it has been questioned whether the R2P ought to be invoked at all in these crises. I.M. Welsh & M. Banda, "International Law and the Responsibility to Protect: Clarifying or Expanding States," *Global Responsibility to Protect* 2(3) (2010): 231.

[7] Thanks to an anonymous referee at the *Journal of Military Ethics* for these last two points.

A Duty to Rescue.

I will begin with a taxonomy of duties. The first distinction I will address is that between general and special duties. General duties are those duties that 'we have to people as such'.[8] The content of general duties includes negative duties 'to avoid various forms of mistreatment, for example',[9] but also includes some positive duties 'to provide limited forms of assistance in some contexts'.[10]

Special duties are those that 'we have only to those particular people with whom we have had certain significant sorts of interactions or to whom we stand in certain significant sorts of interactions'.[11] Special duties can be further divided into contractual duties 'arising out of promises, contracts, and agreements';[12] reparative duties 'to people one has wronged or harmed or mistreated';[13] duties of gratitude 'to one's benefactors';[14] and associative duties 'that the members of significant social groups and the participants in close personal relationships are often thought to have toward on another'.[15]

It would be wrong to think of special duties as merely consisting of a more extensive (compared with general duties) set of positive duties. Special duties may be stronger than general duties; for example, the former are less easily overridden and they may take precedence. Secondly, the relationships out of which special duties arise might involve a strengthening of negative duties, though may sometimes involve a weakening.[16]

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[8] S. Scheffler, *Boundaries and Allegiances* (Oxford: OUP, 2001), 49.
[9] Ibid. p 40.
[10] Ibid. p 48.
[11] Ibid. p 49.
[12] Ibid. pp 49-50.
[13] Ibid. p 50.
[14] Ibid. p 50.
[15] Ibid. p 4.
[16] Ibid. pp 52-3.

Goodin[17] argues that the duty to protect is general but assignable.[18] The example of a passerby's duty to save a child who would otherwise drown in a paddling pool (an action involving minimal cost to the passerby) shows there are general 'natural' positive duties that we all have towards each other.[19] His example of the lifeguard on the beach shows that a duty to save drowning people can be assigned and then has more a social character (in Scheffler's terms it is a contractual special duty); the lifeguard's responsibility is now grounded in the existence of the relevant social institutions.

According to Goodin, the duty of a state to protect its citizens is best understood as derived from a general duty to protect, which is in this case assigned to the state. The concept of assignment here is the same as that illustrated by the drowning child and lifeguard examples.

We need to clarify what assignment of duties amounts to. Suppose we believe there is a general (positive) duty to X. So both persons A and B have this duty. Now suppose that the existence of relevant social institutions 'assign' this duty, in some contexts, to person A. Firstly, it is not the case that B no longer has this duty – even in the specified contexts. B still has the duty, but it may be the case that the best way that they can fulfil the duty to X is to allow A to carry out the necessary actions. For example, the presence of a lifeguard does not mean that other persons no longer have a duty to help people where they can (on this particular

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[17] Robert. E. Goodin, "What Is So Special about Our Fellow Countrymen?" *Ethics* 98 (1988): 663 – 686.

[18] Roff calls into question the coherence of a duty that is general but assignable. Her argument is that a general duty already is assigned - to all agents. H. M. Roff, "Response to Pattison: Whose Responsibility to Protect?" *Journal of Military Ethics* 8(1) (2009): 83. If we embrace this point, then we could say that the general duty to X is assigned to all, but a duty to X *of a different character grounded in relevant institutions* can also be assigned to certain agents.

[19] In adopting the 'child in the paddling pool' example, I do not present this as an analogy to humanitarian intervention. It is meant to draw out the nature of the duty to rescue as a general positive duty.

stretch of water); but perhaps the best way they can fulfil this duty is to allow the lifeguard to save people without hindrance.

Secondly, person A now seems to have the general duty to X, but also the special duty to X in the relevant contexts. The difference this makes is related to Scheffler's comments on the strength of special positive duties. Returning to the lifeguard, when not on duty the lifeguard has with everyone else the duty to help – where they can - people who get into trouble in the water. But, as with everyone else, this duty may in some circumstances be overridden by other considerations such as personal danger to the self. However, once this duty has been assigned as a special duty to that person in their role as lifeguard then it is a stronger duty, less easily overridden by other factors. One result of this is that the lifeguard is obliged to put herself in danger to save others in circumstances where the general duty to help could be overridden by considerations of personal safety (I will say more on this below).[20]

Goodin's treatment does not make the distinction between the duty to protect, and the duty to rescue. Returning to the drowning child example, while the passerby has a general negative duty to refrain from treating others in certain ways (intentionally unjustifiably harming them, for example) they do not have a general positive duty to protect all children nor one to protect this particular child. A general positive duty to protect would require all manner of involvement in the child's life to safeguard against harm. There are good reasons for social arrangements where this demanding duty is better viewed as a duty of persons

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[20] Fabre (C. Fabre, "Mandatory Rescue Killings," *The Journal of Political Philosophy* 15(4) (2007)) argues that where persons have voluntarily taken on certain roles (firefighter, policeman), then duties to rescue are more demanding, and can require them to take risks that would not be demanded of persons who had not volunteered for such roles (p 371). This has implications for soldiers; volunteers may be required to undertake humanitarian intervention in situations that may be judged too risky for conscripts (p 372).

close to the child (parents, teachers). There are also good reasons for institutional arrangements for monitoring of the fulfilment of these duties (by social workers for example) and the possibility of re-assignment of these duties if necessary. So my claim is that the positive duty to protect is a special duty.

But, in addition to the special duty to protect, there is a general duty to rescue. In the case of the child in the paddling pool the passerby has a general positive duty 'to provide limited forms of assistance in some contexts',[21] when a person is faced with 'an urgent situation of imminent peril'.[22] The context here is that if one agent is able to prevent disaster to others (without incurring unreasonable cost to themselves – more on that below), then they ought to provide sufficient assistance to prevent that disaster. It is this duty that I have called the duty to rescue. The lifeguard example shows that the duty to rescue can also be assigned by relevant social institutions. However, note that the lifeguard (in her capacity as lifeguard) does not have a special duty to assist everyone who happens to be on her beach (for example, no special responsibility to stop someone stealing my ice-cream); she has a special duty to rescue people who are in danger of drowning in a specified stretch of water.

So a duty to protect is a wide-ranging duty of care that may entail continual involvement in other peoples' lives. The background for this involvement in others' lives is best understood as arising from some relationship such as a special personal relationship or belonging to a particular social group. Hence this duty is an associative duty, a special (positive) duty.[23] A duty to rescue, on the other hand, is a specific situational/contextual duty to provide limited assistance if a

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[21] Scheffler p 48.
[22] Lord Justice Edmund Davies,, quoted in E.J. Weinrib, "The Case for a Duty to Rescue," *The Yale Law Journal*, 90(2) (1980) 274.
[23] The duty to protect could also be a contractual and therefore special duty, for example in the case of some state-provided social services.

particular state of affairs comes about; that is, 'an urgent situation of imminent peril'.[24] 'A rescue presupposes the existence of an emergency, of a predicament that poses danger of a greater magnitude and imminence than one ordinarily encounters'.[25] Since once that emergency arises the requirement to assist can fall on anyone who can, the duty to rescue is a general positive duty.

Note that the duty to rescue is not an open-ended duty to 'get involved' in any and all rescue actions. It will be bounded by considerations of prospect of success, and cost to the intervener.[26] The duty to rescue will be stronger when prospect of success is high and cost to rescuer is low, and weaker when prospect of success is low and cost to rescuer is high.[27]

Characterising the duty to rescue as a general duty need not require everyone getting involved in rescues whenever and wherever they arise. In the case of the child who is drowning in a paddling pool, if there were a number of passers by who all simultaneously attempted rescue it would be likely that they would all get in each other's way; the rescue attempt would be inefficient, and at worst, fail. It would be expedient in those circumstances for one or two to undertake the rescue. As with the lifeguard case above, the persons who do not get involved in the rescue do not 'pass on' this duty to other persons. A better way of viewing the situation is that they still have the duty, but best fulfil it by standing back and allowing others to take action.

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[24] Weinrib p 274.
[25] Ibid p 281.
[26] J. Davidovic, 'Are Humanitarian Military Interventions Obligatory?' *Journal of Applied Philosophy* 25(2) (2008): 134-144.
[27] The formulation of public rules would therefore need to include some procedure for judging prospects and costs. While some institutional framework could mitigate problems of subjectivity, that might come at the cost of making those procedures slow or paralysing.

Appointing those best-suited to carry out the rescue might be straightforward in some cases. In the case of the paddling pool, somebody being closer and therefore quicker to act or being a first-aider might be good reasons for them undertaking the rescue. However, the idea of appointing persons to act from amongst those who have the general duty, in the absence of effective action from persons with a special duty, can lead to problems. Firstly, persons could just stand by and allow avoidable harms to occur (claiming that they were) expecting others to be appointed or to 'self-appoint'.[28] Secondly, persons could 'self-appoint', but for wrongful intentions (for example, someone self-appointing to save a child with the intention of abducting them). This problem with appointing of rescuers will be looked at below, under 'humanitarian intervention'.

I will consider here the objection that a duty to protect could give a moral basis for requirements to rescue but also account for other action-governing norms; so why focus on the concept of rescue?

There are pragmatic reasons for appealing to a duty to rescue, rather than a duty to protect, to morally ground international law that would require 'collective action, in a timely and decisive manner'.[29] Convergence of agreement on the moral principles underpinning law is a desirable state of affairs. This would yield an overlapping consensus on the public rules. If diverse traditions can agree on the basic principles, then support for the rules would not be a mere *modis vivendi* dependent on power and interests. The possibility that each can agree those basic principles (for their own reasons) can give stability to the rules that they are meant to ground.[30]

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[28] See for example the literature on Kitty Genovese.
[29] 'Implementing the Responsibility to Protect,' p 4.
[30] See Chapter 1 for more on 'overlapping consensus'.

My duty to rescue triggered by an urgent situation of imminent peril is more narrowly defined and is less demanding than a duty to protect. Hence both in terms of the content of diverse moral traditions and the possibility of agreement in policy-making fora, there ought to be greater prospect of consensus on a duty to engage in acts of humanitarian intervention if they are understood as acts of rescue. Furthermore, there is evidence that there is such agreement. In 2008, Ban Ki-moon expressed the worry that the three-pronged 'responsibility to protect' strategy was being viewed as a western or northern invention, imposing that view on the rest of the world. He defended his strategy (as non-western or non-northern) by appeal to the African Union's assertion of a right to intervene in the territory of a member state in 'grave circmstances' to prevent war crimes, genocide or crimes against humanity.[31] The language here suggests rescue (urgent situations of imminent peril) rather than the broader 'responsibility to protect'.

None of this denies that we have duties to protect the vulnerable, or other wider-ranging positive duties to protect. My account can remain neutral on that score, and is consistent with claims that we do have such duties.

A Duty to Rescue Means That There is a Duty to Engage in Acts of Humanitarian Intervention Where Necessary.

Acts of military humanitarian intervention are acts of rescue. For example, the ICISS[32] claimed that for the threshold for just cause for military intervention to be met, there must be (or be imminent) serious irreparable harm to humans, such as large-scale loss of life arising from state action or inaction (neglect, inability, failed state). Large scale ethnic cleansing (by killing, forced expulsion, terror, or rape)

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[31] See http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm (accessed 21/1/11).
[32] International Commission on Intervention and State Sovereignty Report, op. cit. paragraph 4.19.

also counts as a just cause. The act of intervention is one necessary to protect persons in an urgent situation of imminent peril.

'Humanitarian Intervention' can refer to a range of types of action. It can include, for example, one state sending troops into the territory of a neighbouring state in order to alleviate the suffering caused by some disaster (famine, earthquake) because the relief action would only be possible with accompanying force. Another example would be a coalition of states sending armed forces into the territory of some state in order to stop rights violations committed by agents of that state against its own citizens. Or, the armed forces could be being sent into a lawless territory with no viable state institutions. The 2005 World Summit and subsequent Secretary-General's report talked of action to prevent genocide, war crimes, crimes against humanity and ethnic cleansing.[33]

I note here that 'The Responsibility to Protect' literature eschews use of the term 'humanitarian intervention'. Further, the authors prefer not to talk of a right to intervene.[34] Rather, the focus is on responsibility and more specifically with the third pillar, the responsibility to undertake timely and decisive action. This form of words is deliberate to separate the concept of 'timely and decisive action' from that of 'humanitarian intervention' which, it is claimed, has come to be viewed as a deeply flawed policy.[35] Moreover, the intention is to avoid perception of their proposal as an 'intervener's charter'.[36] The term 'humanitarian intervention' is avoided for political purposes. In the following I take the duty to undertake acts of humanitarian intervention to be equivalent to the third pillar, the responsibility to undertake timely and decisive response.

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[33] Report of the Seretary General, op. cit. p 1.
[34] See for example 'R2Pcs Frequently Asked Questions,' at www.responsibilitytoprotect.org.
[35] "Implementing the Responsibility to Protect," p 6 & 7.
[36] "R2Pcs Frequently Asked Questions," p 4.

Where the deployment of troops in the territory of some state for humanitarian purposes is at the request of or with the permission of that state, the moral case for humanitarian intervention does not seem problematic. The state presumably recognises its inability to fulfil its duty to protect its citizens, and either permits or calls upon some other state or the international community to rescue its citizens from imminent or present harm. It is in cases where the target state has not given permission that the contradiction between sovereignty and a permission or obligation to intervene arises.[37]

Where intervention is not at the request of the state we can distinguish between, on the one hand, cases in which it is either failing in its duty to protect people in its territory from aggression by others (possibly other citizens of the state)[38] or it is failing to protect its own citizens from the consequences of famine and natural disaster, and on the other hand cases in which the state is aggressing against persons within its territory. In the latter situation I have said:

> 'where there is violent conflict between the state ('a persisting structure of institutions for the wielding of political power') and the people, with the state as the aggressor, then any moral right of lethal defensive force grounded in protecting the wellbeing of individuals would clearly lie with the people (the encompassing group) and not with those wielding political power. If the structure of institutions that constitute state A had a right to defence independent of considerations of the wellbeing of individuals, this would be forfeited by the unjustified aggression to the citizens of A.' (p 161 above)

Regarding state A's right to defend sovereignty and territorial integrity, the tension between that right and the duty to intervene dissolves, because the moral right of defence is forfeited in these circumstances. However, insofar as an absence of a right of defence does not necessarily entail an absence of a duty not to interfere,

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[37] G. Brock, "Humanitarian Intervention: Closing the Gap Between Theory and Practice," *Journal of Applied Philosophy* 23(3) (2006): 277-291, and J.T. Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), Chapter 3, discuss this tension; both argue that the reasons for intervention can overcome the presumption against intervention.

[38] I am not presenting the distinction between 'the state' and 'the people' as a necessary condition for intervention. There may be conflict situations in which this distinction is not clear-cut.

this does not yet settle the tension between the obligation not to violate sovereignty, and the case for intervention. If we believe that another state is morally permitted to intervene in the target state, then we must consider that the obligation not to violate sovereignty is overridden, or is outweighed, or yields in some other way to the reasons for intervention. I have said elsewhere[39] that in order to prevent constant interference of states in each other affairs, the bar would need to be set high. For example, if the cause for concern were that agents of the state are aggressing against the citizens, this would need to be systematic or pervasive rather than an isolated incident.[40]

Davidovic[41] argues that since sovereignty is instrumentally valuable to preserve life and liberty, the presumption against intervention can be disregarded when necessary to preserve life and liberty. Therefore intervention can be permissible. If conditions for permission are met, then intervention would be a minimally decent act; minimally decent acts are obligatory, hence intervention is obligatory when it is permissible.

My argument runs the other way. There is an obligation to rescue others when necessary. When it is necessary to intervene to preserve the wellbeing of persons, the presumption against intervention can be disregarded, because sovereignty's value is instrumental, to preserve that wellbeing.[42]

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[39] p 161 above.
[40] Altman and Welman argue that the moral threshold could be 'a very poor human-rights record', as opposed to (the less permissive) supreme humanitarian emergency. A. Altman & C.H. Wellman, "From Humanitarian Intervention to Assassination: Human Rights and Political Violence," *Ethics* 118 (2008): 233. They are 'agnostic' regarding how their moral theory could be reflected in international law; by contrast I claim that (whatever the moral threshold), the legal threshold needs to be high.
[41] Davidovic op. cit. p 134-144.
[42] In the next section I consider the move from the justification of individual acts, to the justification of general rules.

The first type of case (or range of cases) I referred to above does not involve agents representing the state actively harming citizens; rather, the state is not preventing serious harms to its citizens (ether from lack of will, or lack of ability).[43] We could say that where the state fails in its duty to protect, then other agencies (other states, for example) have the duty to rescue. And as with the previous case, if the structure of institutions that constitute the state had a right to use self-defensive force, it is forfeited by its failure to fulfil (important) obligations. In addition, the obligation to respect sovereignty can be disregarded due to the necessity of doing so to preserve wellbeing of individuals. Hence on both cases, morally speaking the contradiction can be resolved in favour of permissible intervention.

International Law Ought to Include a Duty of Humanitarian Intervention.

Even if convergence of agreement could be established on a moral duty to undertake acts of humanitarian intervention, it would not immediately follow that this duty ought to be embodied in positive law. For example, to return to a domestic analogy, persons in both the UK and France could agree that there is a moral duty for individuals to provide assistance to others when they face imminent danger; yet France has embodied this in law while the UK has not.[44]

At the level of rule formulation, there is tension between promoting peace, and engaging in conflict.[45] So while the moral principle in question is essentially

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[43] My account rolls together cases of vulnerability due to natural causes and cases where some people are actively violating the rights of other people. Both are treated as cases of rescue. Hence I am not considering punishment - for the rights-violating acts - as a justification or a part of the justification for intervention. This is in line with modern interpretations of Just War theory, which do not include punishment as a just cause.

[44] The law of 'non assistance a personne en danger'. A response to my example could be that it *is* the case that this moral norm ought or ought not to be embodied in law, and the legislators in either France or UK 'got it wrong'. My point is that insofar as legislators in France and UK do not agree on this point, there is at least some debate to be had on the matter.

[45] See Brock, for example. I recognise that some humanitarian interventions can be relatively peaceful - in which case my claim of a tension between promoting peace and engaging in conflict

deontological (modified by risk and prospect of success constraints), rule formulation ought also to take into account the consequences of the existence of those rules. The desire for peace means setting the bar high for conditions justifying intervention, but not too high. We want to avoid two situations – no intervention, and powerful states unjustifiably intervening for self-interested reasons.[46]

As with the domestic case, we need to consider who appoints or assigns the duty to rescue. For example, permitting unilateral decision-making could result in powerful states interfering with weaker states. On the other hand, requiring unanimity (between representatives of states) in decision-making could lead to stalemate and subsequently either failure to intervene, or unsanctioned unilateral intervention as one state decides it cannot 'stand-back' from the tragedy.

Walzer argues that while the UN is usually seen as the appropriate body for authorising humanitarian intervention, there are reasons to think that (non-UN) multilateral authorisation, or unilateral initiatives, would be better.[47] Paragraph 50 of the 2009 report[48] touches on this issue. It says that authorisation for action under Chapter VII of the UN Charter must be at intergovernmental level; but as an emergency situation unfolds, regional, sub-regional and national decision-makers ought to remain focussed on the issue of saving lives rather than prizing procedure above all else. In Chapter 9 I will present an argument for viewing the UN as the rightful authority to take the decision to undertake humanitarian intervention.

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seem to be false. However, I have claimed above (Chapter 6) that use of armed force carries the risk of escalating into war. It is this potential for use of armed force to escalate into war that is in tension with the aim of promoting peace.

[46] Brock p 282. There could be situations where conditions for justifiable intervention were met, but the only viable intervener would be doing so for self-interested reasons. There is also a problem with ascribing reasons to states; as coalitions, there may be a variety of reasons for actions.

[47] M. Walzer, *Arguing About War* (New Haven and London: Yale University Press, 2004), 67-81.

[48] Op. cit. pp 22-23.

A related issue is how the duty to undertake acts of rescue can be distributed amongst states. Pattison[49] argues that the duty to intervene ought to be assigned on the basis of effectiveness. The problem with this, as he recognises, is that this criterion could continually assign the duty to the same state. That would be a problem because any particular state does not have the duty to resolve every severe human rights disaster, but has some duty to act with others to do their fair share and not to hinder others. If a state acts on its duty to rescue in one area, then there needs to be some agreement regarding to what extent this relieves them, at least for a while, of the general duty to rescue should other emergencies arise.

Some Objections, and Responses.

In this section, I will briefly consider and respond to a claim that acts of intervention are not justifiable; consider in more detail some objections to embodying in law a permission to intervene; and reply to the objection that the focus on a duty to rescue is too narrow.

Firstly, the justifiability of the act: Mill argues that freedom can only be achieved as a result of a community's own struggle.[50] Begby[51] claims that Walzer interprets Mill as saying that humanitarian intervention is not morally justifiable; it is better for a community to work out its own problems. Begby further claims that this interpretation is wrong. However, whether or not this view is rightly attributable to Mill, my argument for a duty to rescue shows that the view is mistaken; at least in some cases intervention would be justifiable. This would be the case when the

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[49] James Pattison, "Whose Responsibility to Protect? The Duties of Humanitarian Intervention," *Journal of Military Ethics* 7(4) (2008): 262-283.
[50] John Stuart Mill, "Foreign Intervention and National Autonomy," in *The Ethics of War* ed. G.M. Reichberg, H Syse, and E Begby, (Oxford: Blackwell Publishing, 2006), 574-585.
[51] E. Begby, "Liberty, Statehood and Sovereignty: Walzer on Mill on Non-intervention," *Journal of Military Ethics* 2(1) (2003): 46 - 62.

existence of the community itself is at stake. Freedom, after all, is not the only relevant value. At the limit, refraining from intervening on the grounds that it would be better in the long run for the community in question does not make sense if it is foreseen that the community would not survive its crisis without intervention.

Next, the justification of the law: when we consider the consequences of embodying a principle in law, we need to be aware that it is possible for laws to create 'perverse incentives'.[52] For Buchanan's presentation of the concept of 'perverse incentive', he argues that embodying in law a right to secession by a sub-state community under certain conditions can give an incentive for a state (which is opposed to secession) to engage in morally undesirable activity (such as ethnic cleansing) in order to ensure that the conditions that trigger the right to secession are not met. This argument can be generalised; if a principle permitting or requiring action X under circumstances C is embodied in international law, and if state S considers X to be against S's interests, then if S can prevent circumstances C by engaging in some morally undesirable activity, existence of the law gives an incentive to do this activity.

In the current case, the 'perverse incentive' runs the other way; morally undesirable action to bring about C. Suppose that the right (or requirement) of humanitarian intervention in state S under conditions C is embodied in law. And suppose now that a different state, A, has aggressive designs on S. Then it could be in the interests of A to interfere (either legally or illegally) in the internal affairs of S to bring about conditions C in order to legitimise the deployment of troops in S's territory.[53] So the possibility of creating 'perverse incentives' gives an objection

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[52] A. Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26(1) (1997): 43.
[53] See for example J. Bricmont, J. *Humanitarian Imperialism: Using Human Rights to Sell War* (New York: Monthly Review Press, 2006) (see next footnote).

to embodying in law a duty (or a right) to engage in acts of humanitarian military intervention.

Suppose now that state A, that has designs on state S, does not interfere in the way described above. It could still be the case that if conditions justifying intervention arose in the absence of that interference, state A could then deploy troops in S territory under the guise of humanitarian intervention, thus fulfilling their tacit goal of gaining control of S or its resources. Bricmont[54] argues that, as a matter of fact, the doctrine of humanitarian intervention is used as a cover for imperialistic meddling in this way. More specifically, the US appeals to the idea of defending human rights in order to 'justify' interventionist foreign policy. He claims that when one looks at the countries that are the target of intervention - and those that are not – one sees that the appeal to rights is merely a cover for US imperialism. The power of the appeal to rights, he says, is that it gains support from liberals and intellectuals, and any opposition to the interventions is viewed as support for the 'New Hitlers' of the target countries.

Bricmont further claims that a doctrine of intervention undermines international law in two ways. First, because interventions are taken without legal support,[55] they undermine international law and so lead to further violations. Second, the doctrine of humanitarian intervention undermines state sovereignty and so undermines one of the cornerstones of international law (and international law is all that stands between us and war of all against all). Bricmont's arguments are echoed by Fotion[56] who says that claims regarding the necessity of intervention would inevitably be used as 'window dressing' by political leaders who want to invade

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[54] Ibid. These arguments are the subject matter, for the most part, of the whole text.
[55] That is, without UN approval.
[56] N. Fotion, *War and Ethics* (London: Continuum, 2007), 25.

other states for self-interested reasons. In Just War terms, there is a problem with 'right intention'.

Norman[57] argues that intervention in states in the name of human rights can be justifiable, but military intervention is generally a bad way of trying to uphold rights. Military interventions inevitably result in violations of rights, and a legal permission to intervene would most likely be abused. He claims that the UN Charter, if adhered to, would be the end of war,[58] while a permission to undertake military intervention would lead to endless war.

Bricmont, Fotion and Norman could all agree, in principle, on the moral justifiability of humanitarian intervention. But their arguments give reasons for not embodying in international law a unilateral permission to intervene. On the other hand, embodying interventionist norms in international law along with adequate institutional structures for implementing that law to ensure that those norms are not abused would remove at least some of these objections. These thoughts suggest that in finding rules that strike the balance between no intervention, and powerful states interfering for self-interested reasons, Walzer's suggestion is not the right one. It would be better to require UN authorisation, rather than permitting unilateral or non-UN coalitions to act. Of course, if individual states then considered that this requirement was standing in the way of urgently needed intervention, they could act unilaterally (or in a coalition with others). But the illegitimate status of this action would deter them from doing so unless they thought it absolutely necessary, and deter them from doing so for self-interested reasons. Critics may argue that an absence of permission to unilaterally intervene

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[57] R. Norman, "War, Humanitarian Intervention and Human Rights," in *The Ethics of War*, ed. R. Sorabji and D. Rodin (Aldershot: Ashgate Publishing, 2006).
[58] Which seems rather like saying, in a domestic case, if everyone adhered to the law there would be no crime.

has not stopped states interfering for self-interested reasons. That may be so, but the point here is to find some alternative to allowing unilateral intervention (as suggested by Walzer) on the one hand, and maintaining a complete prohibition on the other. While the former could lead to a proliferation of unjustified interventions, the latter would prevent those that are morally obligatory.

Finally, the ICISS considers that the responsibility to protect does not only entail a responsibility to react, but also a responsibility to prevent and to rebuild.[59] And the Secretary General's 2009 report identifies the second pillar of responsibility as a requirement for international assistance and capacity-building, which he takes to encompass prevention and rebuilding.[60] So the objection here is that my account is too narrow – focussing on the responsibility to intervene.

In reply, there is enough scope in the duty of rescue to cover at least some aspects of prevention and rebuilding. For example, rescue may entail catching someone by the arm before they step onto the unsafe bridge, rather than wait until they fall in the water. And it may require more than merely dragging a drowning person out of the river – perhaps helping them to find dry clothes and call their next of kin. The problem then is that there is a 'slippery slope', and the duty to rescue becomes increasingly difficult to distinguish from the duty to protect the vulnerable.

If that were so, perhaps that would lead us to conclude that the duty to protect the vulnerable is a better explanation of all three aspects of intervention – rescue, prevention, and rebuilding. However, given the need to develop policy that can lead to timely and decisive action, there are political (pragmatic) reasons for

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[59] International Commission on Intervention and State Sovereignty Report, op. cit. paragraph 2.29.
[60] Ibid. Para. 50

preferring the 'rescue' model, as the moral principle underpinning that policy. So morally speaking we ought to treat military intervention on the one hand, and prevention and rebuilding on the other, separately, rather than rolling them all up together.

In conclusion, acts of military intervention can be justifiable, and a law permitting or even requiring intervention can be justifiable provided that it is supported by adequate institutions. Specifically, individual states ought not to have the authority to unilaterally intervene; legal authority to instigate military intervention ought to lie with the UN. In the following chapter we will see that that question of the locus of authority is also central to the problem of preventive war, and I will then treat the Rightful Authority requirement in detail in Chapter 9.

8. PREVENTIVE WAR.

From the point of view of the Just War conception, the permissibility of preventive or preemptive war is not a question of whether these can be just causes;[1] the just cause (if there is one) is the threat that is to be prevented or preempted. Rather, the concern here is how the 'last resort' constraint is to be interpreted and in what circumstances, if any, it can be waived.

My argument will be that in the absence of a public body authorising some viable agency to use preventive force to halt conspiracies to harm, the use of force to that end by either individuals or collectives can be morally justifiable. Since the end being defended is the wellbeing of the individual(s), we ought to treat this as self-defence. So the right of self-defence can, under some circumstances, justify force to counter threats of future harm. Where there are public rules, an impartial judge and viable enforcing institutions, the situation is different. For those not authorised to use preventive force the question of imminence which drives the distinction between preemption and prevention is crucial; the former but not latter could be justifiable. Prevention is not morally permissible (by those not authorised) because the 'last resort' condition is not met. So it seems that judgments regarding preventive war must take account of institutional considerations; in particular, the status of the UN.

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[1] Though some authors treat it as though it is. For example, Fotion discusses preventive war in his section on just cause. In the discussion of last resort, he says that 'The last resort principle helps explain why Just War Theory does not allow preventive wars'. On my reading the last resort principle does not help explain the prohibition; it is the prohibition. N. Fotion, *War and Ethics* (London: Continuum, 2007), 12 - 14.

Preventive War: Current Affairs and Recent Debate.

A motivation of much of the recent debate stems from the so-called 'Bush Doctrine'. The US National Security Strategy of 2002 stated an intention to engage in preventive war. The strategy is presented as one of preemption; for example:

> 'For centuries, international law recognized that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack. Legal scholars and international jurists often conditioned the legitimacy of preemption on the existence of an imminent threat—most often a visible mobilization of armies, navies, and air forces preparing to attack.' [2]

Yet when the content of the strategy is spelt out, it is clear that what is intended is preventive action:

> 'Given the goals of rogue states and terrorists, *the United States can no longer solely rely on a reactive posture* as we have in the past. The *inability to deter a potential attacker*, the immediacy of today's threats, and the magnitude of potential harm that could be caused by our adversaries' choice of weapons, do not permit that option. We cannot let our enemies strike first.' And 'The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction — and the more compelling the case for taking anticipatory action to defend ourselves, *even if uncertainty remains as to the time and place of the enemy's attack.* To forestall *or prevent* such hostile acts by our adversaries, the United States will, if necessary, act preemptively.' (My emphases.)

This strategy did not come out of the blue. In 1997, the Project for the New American Century, whose stated aim is to 'make the case and rally support for American global leadership', claimed that 'it is important to shape circumstances before crises emerge, and to meet threats before they become dire'.[3]

Key questions here concern the justifiability of preventive action, and the justifiability of permitting such action in public rules. On these issues, opinions are divided. Rodin argues against both the justifiability of the act and of a permission in public rules. These cannot be supported by consequentialist arguments because of insurmountable epistemological problems. Neither can they be

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[2] The National Security Strategy, V. Prevent Our Enemies from Threatening Us, Our Allies, and Our Friends with Weapons of Mass Destruction, http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nss5.html (accessed 20/9/09)

[3] The Project for the New American Century, Statement of Principles, www.newamericancentury.org/statementofprinciples.htm, (accessed 20/9/09)

supported by self-defence arguments, because the proposed target has not yet done anything to render them liable to defensive force.[4] Uniacke argues that prevention cannot be justified by appeal to a right to self-defence; if it is justified, it must be on some other grounds.[5] Shue sets out limiting conditions under which prevention could be justifiable, with the caveat that in practice no early military action has met those conditions.[6] Similarly, McMahan says that conditions for a justified preventive attack would be very difficult but not impossible to meet.[7] For him the key issue is whether the proposed target of preventive force has acted in a way that renders them liable to attack; for example, by conspiring to attack, or committing some offence short of an attack which nonetheless may render them a legitimate target. Crawford says that preventive wars would destabilise the international community.[8]

Luban, on the other hand, argues that prevention can be justified in order to protect basic rights[9] and Sinnott-Armstrong defends it on consequentialist grounds.[10] Dipert claims that the epistemological problems regarding preventive action, such as those that worry Rodin, can be met.[11] Fotion considers that prevention could be justifiable for states facing threats from non-state entities.[12]

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[4]David Rodin, "The Problem with Prevention," in *Preemption: Military Action and Moral Justification*, eds. H. Shue and D. Rodin (Oxford: Oxford University Press, 2007), 143-170.
[5] Suzanne Uniacke, "Getting One's Retaliation in First," in H. Shue and D. Rodin, 69-88.
[6] Henry Shue: "What Would a Justified Preventive Military Attack Look Like?" in H. Shue and D. Rodin, 222-246.
[7] J. McMahan, "Preventive War and the Killing of the Innocent," in *The Ethics of War*, ed. R. Sorabji and D. Rodin (Aldershot: Ashgate Publishing, 2006), 186.
[8] Neta C. Crawford: "The False Promise of Preventive War: The 'New Security Consensus' and a More Insecure World," in H. Shue and D. Rodin, 89-125; and "The Justice of Preemption and Preventive War Doctrines," in *Just War Theory: A Reappraisal*, ed. M. Evans (Edinburgh: Edinburgh University Press, 2005), 47.
[9] D. Luban, "Preventive War," *Philosophy & Public Affairs* 9(2) (1980); and "Preventive War and Human Rights," in H. Shue and D. Rodin, 171-201.
[10] Walter Sinnott-Armstrong: "Preventive War, What Is It Good For?" in H. Shue and D. Rodin, 202-221.
[11] R. Dipert, "Preventive War and the Epistemological Dimension of the Morality of War," *Journal of Military Ethics* 5(1) (2006): 32 - 54.
[12] Fotion, op. cit. Chapter 8.

Finally, Buchanan sets out the institutional framework in which he argues it would be justifiable to permit preventive war in public rules.[13]

The Distinction Between Preemption and Prevention.

The distinction between preemption and prevention is that a preemptive strike happens when the foreseen unjust aggression is imminent; there is not time to pursue any other 'last resort' options. Preventive war, by contrast, occurs before the predicted unjust aggression becomes imminent. So the difference between them is one of timing. It would be difficult to draw a distinct threshold between the two – there will inevitably be some 'grey area' - but that does not prevent us from treating them as distinct concepts.

Suppose a person is about to be mugged by another. The intended victim is not able to walk away, and because the assailant is already preparing to land a blow, there is not time to negotiate. Rather than wait for the mugger to land the first blow, the victim throws the first punch in order to defend themself. This then is preemptive use of defensive force.

Israel's attack on the Egyptian air force at the start of the Six Day War in 1967 is an example of a preemptive strike. Walzer treats this example in some detail,[14] but the key features here are the build-up of the Egyptian military in conspicuous preparation for war, the exhaustion of diplomatic options making use of force by Israel a last resort, and Israel's anticipatory strike at Egyptian airfields to stop their airforce from gaining an unassailable dominance in the imminent conflict.

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[13] A. Buchanan, "Institutionalising the Just War," *Philosophy and Public Affairs* 34(1) (2006): 2-38; and "Justifying Preventive War," H. Shue and D. Rodin, 126-142; and A. Buchanan and R.O Keohane, "The Preventive Use of Force: A Cosmopolitan Institutional Proposal," *Ethics & International Affairs* 18(1) (2004): 1-22.

[14] Walzer, M. *Just and Unjust Wars* (New York: Basic Books, 2002 3rd edn), 82 – 85.

Suppose that a (different) person hears that a neighbour has acquired a baseball bat and is plotting to attack him the next time he is walking home alone late at night. Instead of waiting for the attack, the intended target goes to the neighbour's house, kicks down the door, and forcibly – involving throwing a punch - takes away the bat issuing the warning never to plot such an attack again. This is an example of preventive use of force. Germany's invasions of Denmark and Norway in 1940 in order to prevent Britain from launching attacks from these countries is an example of preventive war.

An example of a preventive strike – rather than preventive war[15] - is Israel's attack on the Osirak reactor in Iraq, on June 7 1981. The Israeli leadership claimed that the plant was designed to produce nuclear weapons and so posed a future threat. However, in June 1981, the plant was still under construction and did not yet contain nuclear material. Rather than wait for it to be stocked – meaning that an attack would result in radioactive contamination – Israel launched an air strike in order to prevent this (claimed) future threat of harm from materialising.[16]

Now, more than one reason was given to support the claim that the US led invasion of Iraq in 2003 was justified. For example, in his speech of March 18 2003, Blair[17] said that military action was the legal response promised in Resolution 1441, given Saddam Hussein's lack of compliance with inspection requirements. He also said that though regime change was not the main reason for war, it would be a welcome benefit. But he also said that the reason it was so important to respond with force to the breach of 1441 was the need to prevent a

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[15] This could be classed as an act of war, or given the lack of a formal end to hostilities between the two states, an act in war. I say preventive strike rather than war because several years would pass before further use of armed force between the two parties.

[16] http://news.bbc.co.uk/onthisday/hi/dates/stories/june/7/newsid_3014000/3014623.stm, (accessed 20/9/09).

[17] Blair's Speech to the House of Commons, 18 March 2003 http://www.guardian.co.uk/politics/2003/mar/18/foreignpolicy.iraq1 (accessed 20/9/09).

'tyrannical regime' from possessing WMDs. So at least in reference to this reason given for resort to force, this is an example of preventive war.

Permissible Use of Preventive Force.

There are conditions under which preventive use of force can be justifiable. Returning to the domestic example above, the intended victim of the baseball-bat attack could have telephoned the police instead of confronting the neighbour himself. Suppose the police believed the would-be attacker to be a dangerous individual, and so on arriving at his house, broke down the door and forcibly handcuffed him. An important feature of this case is that the institutional frameworks authorise the police to use force in this way. The public rules permit use of preventive force by authorised agents to counter a conspiracy to cause harm. Morally speaking, public rules authorising such action could be justified by an appeal to consequences; they reduce rights violations, such as unprovoked baseball-bat attacks. To be justifiable, those rules ought to incorporate limits on the use of force in the prevention of conspiracy. For example, only using necessary and proportionate force, and the action must be backed by reliable evidence. Provided that we judge that rules permitting preventive police action are justifiable, and that in my 'baseball-bat case' this would be a proportionate response to the situation, this would be justifiable preventive force.

In the absence of public rules authorising some viable body to use preventive force to halt conspiracies to harm, individuals can be morally justified in using force to that end. If we were to adopt a Hobbesian view, then if there were no institutions to stop conspiracies developing into actual attacks the neighbour's use of defensive force could be justifiable to stop the conspiracy developing because in a 'state of nature' persons may use any means that they think appropriate for

self-preservation.[18] However, trying to draw the distinction between morally justifiable and unjustifiable use of force might be misleading here because in Hobbes' scenario 'The notions of right and wrong, justice and injustice, have there no place'.[19] Suppose we take a view more like Locke's, in which some moral claims hold even in the absence of a common judge and the absence of persons authorised to enforce public rules. Nonetheless, for Locke preventive use of force is permissible too. A 'declared design of force' puts persons in a state of war with one another, and in a state of war the innocent part has the right to destroy the other 'whenever he can'.[20] We do not, however, need to subscribe wholly to either Hobbes' or Locke's view to conclude that individuals can be morally justified in using preventive force. Since the end being defended is the wellbeing of the individual(s), we ought to treat this as self-defence. So the right of self-defence can, under some circumstances, justify preventive force.

Uniacke draws the distinction between a threat of future harm, and a future threat of harm.[21] We ought here to distinguish between 'threat' referring to a speech act, and 'threat' referring to the objective possibility of harm. The latter need not necessarily be accompanied by the former. I will henceforth reserve the term 'threat' to refer to the objective possibility of harm. For Uniacke, a future threat refers to circumstances that could develop into a threat in the future; for example, a dispute between neighbours over the height of a hedge, where one neighbour is known to have a violent disposition. The conditions under which there is an actual

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[18] Thomas Hobbes, *Leviathan*, ed. E. Curley (Indianapolis: Hackett, 1994), 79.
[19] Ibid. p 78.
[20] John Locke, *Second Treatise of Government*, ed. C.B. Macpherson (Indianapolis: Hackett, 1980), 25-26. If a declared intention to use force entails that there now exists a condition of war, then no subsequent use of force by the intended target would be preventive war, because it would merely be an act in war. However, I am taking Locke to mean that when it becomes obvious that one party intends to use unjust force, the innocent party has a right to take preventative action and does not have to wait for the unjust force to be imminent. They have a right to make a preventive strike.
[21] Suzanne Uniacke, op. cit. 69-88.

objective possibility of harm do not currently obtain (the neighbour is not currently wielding a baseball bat in the vicinity of my head). But, that situation could develop if circumstances go unchecked.

An example of a threat of future harm would be if the disgruntled party were to set some device programmed to kill the neighbour in one week's time. Alternatively, the neighbour would be subject to the actual objective possibility of harm in the future if the other person issued a credible intention to kill them if they did not cut down the hedge. In this case the harm is not merely time-delayed, it is conditional.[22] Uniacke argues that a person might legitimately act in self-defence against the threat of future harm, but not to prevent a future threat. Her conclusion is that if the latter is to be justified, it must be by appeal to some principle other than self-defence; the concept of self-defence cannot be stretched to justify prevention. This does not contradict my argument. In the Lockean case, use of force is justified not where there is mere lack of common judge, but where there is lack of common judge plus a declared and credible design of force. Hence this is a threat of future harm. The difference between my argument and Uniacke's is that I have called use of defensive force against a threat of future harm preventive, because that future harm is not imminent. She reserves the term preventive for force used to stop a future threat of harm becoming an actual threat. Suppose Uniacke is right about the unjustifiability of preventive force against a future threat. Then, in my terms, her distinction between future threat and threat of future harm is drawing the distinction between threats to which preventive force would be unjustifiable, and to which preventive force would be justifiable (in the absence of viable law enforcement institutions). And we should note that this distinction is not

[22] The intention to use force may be time-delayed, conditional, or contingent (Ibid. p 78).

a temporal one.[23] A future threat could become an actual threat sooner, or later, than the materialisation of the harm that will come about in a threat of future harm.

Returning to the international case, I have said[24] that the goal of the right of national defence is defending the wellbeing of individuals. The right of national defence could then justify use of force to prevent a conspiracy to harm from being realised if there is no viable common judge authorised to initiate use of preventive force.[25] On the other hand, if there is such a viable common judge so authorised, then its agencies can justifiably use preventive force. As with the domestic case, for such an institutional permission to use force to be justifiable, there ought to be constraints. For example, force must be necessary and proportionate, and the case for action must be supported by reliable evidence.[26]

Impermissible Use of Preventive Force, Permissible Preemptive Force.

In my domestic examples of individuals undertaking preemptive and preventive force (the mugging victim, and the intended baseball-bat attack target), the degree of force used by the (intended) victim is roughly the same. Also, in both cases, if they wait for the assailant to strike first, then they foreseeably subsequently lose the capacity to defend themselves; and in both cases there is assumed to exist the institutional framework of law enforcement officials. If we believe that the use of force is permissible in the first case (preemption) and not in the second (prevention), the reason for the difference must be that in the first case there are no other means of avoiding being mugged. In the first case use of defensive force is permissible because there is not time to call the police. The second case is not

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[23] So this distinction is not the same as the preemption/prevention one made earlier.
[24] In Chapter 6.
[25] We can draw these conclusions from analysis of the domestic case provided that we consider them to be sufficiently similar in morally relevant ways.
[26] See for example Henry Shue, "What Would a Justified Preventive Military Attack Look Like?" op. cit. pp 222-246. As the title suggests, Shue examines what conditions would have to obtain for use of preventive force to be justifiable.

justifiable because the intended target could have telephoned the police. The difference between the cases is one of 'last resort': if there is the opportunity to call on those authorised to use force in order to prevent the threat becoming actual harm, then use of force by the individual is not permissible.

If the preemptive action is an act of self-defence, and if we can draw inferences from this for the collective[27] case, then preemptive military action is a form of national defence, and should be judged as such. From the above example, preemption can be justifiable even when viable law-enforcement institutions exist. If we think that the justification of the preemptive action necessarily includes the claim that it is a last resort – the attack is imminent and striking is the only way to stop it – then preventive war[28] would not be justified. This is because (by our definition) the unjust aggression is not imminent, and hence the 'last resort' conditions have not yet been met.

To sum up so far, the first important distinction is between the existence or non-existence of law enforcement institutions - public rules, impartial judgment, and viable enforcement (policing).[29] Where they do exist, the next distinction is between those who are authorised to enforce compliance with rules, for whom both preemptive and preventive force can be justifiable, and those who are not. For those not authorised, the question of imminence, which is driving our distinction between preemption and prevention, is crucial; the former but not latter could be justifiable.

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[27] With 'collective', I mean to include cases where at least one party is an encompassing group.
[28] By individual states when viable law enforcement institutions exist.
[29] Emerton and Handfield also note the importance of viable institutions to the question of using force. They, however, are concerned with how this changes culpability, in the context of *jus in bello*. P. Emerton, and T. Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy and Public Affairs* 37(4) (2009): 392-394.

In the absence of viable law enforcement mechanisms the temporal distinction between preemptive and preventive force is not, by itself, going to mark a distinction between permissible and impermissible use of force. Here we can follow Uniacke in distinguishing between threat of future harm (as in Locke's 'state of war') and future threat. Preventive force is permissible in the former case, not in the latter.

A counter-argument to this is that even when there are law enforcement institutions, some unilaterally initiated preventive strikes may be justified when unjust aggression is not imminent, because the last viable moment to stop the attack is temporally well in advance of the actual harm. Buchanan[30] gives some examples that at first sight appear to fit this model. In his Paralysis example, in a few weeks time you will for some reason become paralysed. You learn that a villain knows this too, and plots to murder you once you are in a defenceless state. Finally, for some reason, you are not able to rely on the help of friends or the police. In this scenario you would be justified in using preventive defensive lethal force against this villain. In his Lethal Virus case, a terrorist group has already committed some lethal attacks. They are currently hiding in a mountain stronghold in country B. It is learnt that they now possess a deadly virus and plan to release it in a major city of country A sometime in the future. Once the terrorists leave the stronghold to make the attack, intercepting them would be very difficult. A missile strike now, on their stronghold, would kill only the terrorists. Under these circumstances a preventive strike by country A would be justifiable. In both these cases the last viable opportunity to strike is temporally well in advance of the foreseen aggression, so the defensive actions appear preventive not preemptive. But they are justifiable, according to this argument, because the strikes take place

[30] Op. cit. p 127.

at the last viable opportunity; if those undertaking preventive action wait, they become defenceless.

One response to this type of example could be to re-evaluate the distinction between preemption and prevention. So far, I have focussed on the issue of imminence; a part of the justification of preemptive action against an imminent threat is that there is no time to pursue any other actions – it is a last resort. But of course the claim in Paralysis Example and Lethal Virus is that it has reached a point of last resort – the defendant cannot wait for the attack to begin. So we should expand the notion of preemption to focus on the 'last resort' aspect rather than the imminence of the threatened harm.

However, although that is correct I do not believe that it is necessary in order to explain, on my account, the intuition that Paralysis and Lethal Virus would be justifiable preventive attacks. In Paralysis, the existence of law enforcement institutions is assumed – 'you are not able to rely on the police... to protect you'[31] – but crucially they are characterised as not effective. They are not viable in critical areas of law enforcement; and I have argued that under those conditions preventive force can be justifiable. Buchanan is silent on the issue of international institutions in Lethal Virus, but we can infer that the authorities of country B are either unwilling or unable to do anything about this criminal group in their territory. So his example assumes at least on the national level an absence of viable law enforcement institutions. And if viable international institutions were assumed, then according to my argument above, unilateral action by A would not be permissible without authorisation from those institutions.

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[31] Ibid. p 127.

Rodin's Conspiracy Paradox.

Rodin sets out 'The Conspiracy Paradox', that appears to show that a doctrine of preventive war is not justifiable.[32] I have claimed that under some circumstances, preventive war is permissible to counter a conspiracy to attack. A conspiracy is characterised by a manifest intent to injure, and active preparation. The problem is that these are also characteristics of a preventive attack. So if manifest intent to injure and active preparation (that is, a conspiracy to attack) is wrong, then preventive war is wrong. But if manifest intent to injure and active preparation is not wrong, then it is not grounds for preventive war. Either way, preventive war is wrong.

So, suppose evidence is found revealing that the political leaders of country X intend to attack country Y, and are undertaking active preparation. On learning of this, the political leaders of Y form the intention to attack X and begin active preparation to that end. If the leaders of Y cite the wrongness of intent and preparation to attack as justification for their actions, then it would seem that by the same criterion their actions are wrong too. On the other hand, if the intention to attack evidenced by Y's preparations is not wrong, then the actions of X are not wrong either. And if X has done nothing wrong, any attack by Y would be unjust.

Rodin suggests a solution to the paradox: preventive war can be permissible only as a reaction to another party's manifest intent and preparation to use force. He then presents two objections to this solution. (a) That the realm of liability would be too narrow. That is, if it is political leaders that develop a conspiracy to attack, then only they are the persons who are morally culpable for wrongdoing. But any preventive strike would inevitably target soldiers who are not party to this

[32] Rodin 2007 pp 166-170.

wrongdoing (since at this stage, *ex hypothesi*, it is still a conspiracy and the soldiers have not yet taken part in any attack). So the preventive strike would inevitably target the wrong people and so would not be justifiable on a self-defence model. (b) Given that the defence strategy of most states involves having troops prepared to engage in conflict, it would be difficult to differentiate between those prepared purely for defence and those prepared for aggression. We then have to guess intentions. If a Hobbesian assumption is made in this guesswork – an assumption for the worst seen as prudential for survival – then this would lead to a proliferation of conflicts as all parties view other parties' strategies as a conspiracy to attack. So according to Rodin, permitting preventive war would be unworkable.

Rodin's 'prevention permissible as a reaction' solution to the paradox is defensible, but some clarification is needed in order to respond to his criticisms of it.

On my account, if viable policing institutions exist there is no paradox with public rules prohibiting preventive use of force. Manifest intent and active preparation to use force is permissible for those authorised to do so, in order to prevent manifest intent and preparation to use force by those not so authorised from becoming actual use of force; so no paradox. In Chapter 9 I will give an account of authorisation; in the following I will assume the conditions in which the paradox does arise - the absence of viable police.

Next, we need to distinguish between the moral justification of the act, the moral decision procedure, and the justification of public rules. Now this may seem a strange move because if we are assuming conditions of no viable law enforcement (otherwise there is no paradox), then claims regarding content of public rules seem hollow. Further, if the relationship between states were considered to be

something like a Hobbesian state of nature, then talk of moral decision procedures and justifiying the act according to some standard of right and wrong may also seem empty.

There is, however, a spectrum of possible conceptions of the relationship between political communities, ranging from a Hobbesian state of nature through to perfect compliance under optimal rules. The question that faces us is how we ought to act in the situation we find ourselves. We[33] have institutions and public rules but they don't work very well all of the time - less than full compliance with (probably) suboptimal rules. Given this, political communities are not free to act as they would be in a Hobbesian state of nature. It is not a case of 'anything goes'; they have to take account of the impact of their actions on the evolution of those institutions. If there is a duty to enter into juridical relations and to bring about and support just institutions (I will argue for this claim in Chapter 9) then, for example, the decisions of political leaders are constrained by the duty to support those institutions that emerge as candidates for fulfilling this role. So talk of public rules, moral decisions and standards of right and wrong are not hollow in conditions of (probably) sub-optimal rules, less than fully viable policing and less than full compliance.

Regarding the moral justification of the act, if the preventive attack only targeted those culpable of conspiracy, then it could be morally justifiable in an absence of viable police. Against this, I have argued that public rules ought not to permit targeting those not in uniform – and these conspiracy leaders may well be civilian politicians. Drawing on my earlier arguments regarding rules of conduct in war, there are institutional reasons for considering uniformed soldiers legitimate targets regardless of whether they are personally culpable for any wrongdoing. Judgments

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[33] Writing in 2010.

of the justification of the act ought also to take into account the content of the public rules. If conspiracy to attack is not an act of war then the strike ought not to be considered an act in war but rather an act of resort to force, and this would violate any prohibition on states unilaterally undertaking preventive war. In doing so it would undermine the viability of authority (the UN) rather than strengthen it. This would not be the case if permission or authorisation for the act were given by the UN.

So, I now turn to the moral decision procedure. Even though a limited attack against soldiers presenting a threat of future harm could in principle be morally justifiable, there remains the epistemological problem of distinguishing between those preparing for aggression and those preparing for defence. So while a preventive attack could hypothetically be justifiable, a decision to do so could be contestable because of the inevitable (according to Rodin) epistemological shortfall. But the locus of this decision does make a difference. An independent decision by a state that preventive war is justifiable could undermine international institutions for the same reasons as above, while a decision by a body like the UN that national defence warrants preventive action would not do so. Further, given the epistemological shortfall, a decision by the UN would be less likely to exaggerate the probability of the threat. Also, it would be more likely to be seen by the international community at large as an objective reading of the situation. So even if we are viewing UN as not having viable policing power, there are reasons why states ought to seek UN authorisation for preventive actions. Reciprocally, the UN ought to ensure it does authorise preventive action where it is judged to be justified.

Finally, the public rules. For ideal institutions and enforcement mechanisms, public rules would prohibit preventive action by states. In a complete absence of international institutions, preventive war could be justifiable for states. The arguments above suggest that for current conditions, public rules ought to permit individual states (or coalitions) to engage in preventive war as a reaction to threats of future harm, but only with the authorisation of the UN. And states would have reasons to comply with this rule even with a 'weak' UN.[34] First, they have a duty to bring about and uphold just institutions.[35] Secondly, this rule is grounded in a principle of self-defence, so if there is agreement (convergence) on this principle then there ought to be agreement (overlapping consensus) on the rule derived from it.[36] Each community may have their own reasons for supporting that principle.

Now, Rodin's epistemological problem[37] for a decision to use preventive force - if it cannot be resolved - remains as a reason that counts against permitting preventive war in public rules. Embodying in the rules a requirement to assign responsibility for that decision to a neutral body could ensure it was unbiased and could attract public confidence in the decision, but does not remove the problem itself.

The problem of determining the intentions of leaders of a state involved in a military build-up could be mitigated by taking into account the nature of the regime

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[34] Though if it is too weak, then perhaps this would be better viewed as a situation with no viable institutions.
[35] To be argued for in Chapter 9.
[36] These are also reasons for deferring to UN authority when a state considers that a defensive action is preemptive (and so no need to seek permission) but the UN claims that it is preventive, and so requiring authorisation.
[37] Differentiating between those preparing for defence and those preparing for aggression.

and its track record.[38] Suppose states A and B are seen to engage in approximately equivalent levels of military preparation. Suppose also that A has never undertaken unjust aggression, while B has a history of so doing. There is then reason to differentiate between the cases and take B's but not A's preparations to constitute a conspiracy of aggression. This observation at least mitigates Rodin's epistemological problem for the moral decision to undertake reactive preventive war.

The nature of the regimes involved – both the proposed target of preventive action, and a state considering preventive war in the absence of viable policing - ought to make a difference to a judgment of the justifiability of preventive war; but this cannot simply be added to other reasons. Firstly, if desirability of regime change is not itself sufficient reason to use armed force, then for prudential public rules it ought not to be added to other insufficient reasons to make a claim of sufficient reason. Secondly, notwithstanding that normative claim regarding formulation of public rules, adding the nature of the regime to other reasons would involve 'double-counting' reasons for action. To see this, consider again Rawls' distinction between a Liberal Society (LS) and a Hierarchical Society (HS).[39] We can now add to this Rawls' Outlaw State (OS), defined as a regime that thinks 'a sufficient reason to engage in war is that war advances, or might advance, the regime's rational (not reasonable) interests'.[40] We can identify an OS by evaluating for example past actions of agents of the state, and statements made by its political leaders.

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[38] Lucas cites Orend's endorsement of including a state's 'track record' in judgments of the justifiability of resort to force. G. R. Lucas Jr, "'Methodological Anarchy'; Arguing About War - and Getting It Right. Brian Orend, The Morality of War," *Journal of Military Ethics* 6(3) (2007): 250.
[39] See Chapter 6.
[40] J. Rawls, *The Law of Peoples* (Cambridge Massachusetts: Harvard University Press, 2001), 90.

It seems reasonable to claim then that in attempting to determine the intentions behind military preparations, we ought to be more suspicious of OS compared with LS and HS. Given an overall greater disposition of OS to undertake aggression, less evidence would be required in any particular instance in order justifiably to conclude that there is a conspiracy to aggress. So the nature of the regime, based on its history, is contributing to the claim that there is just cause for war. But we cannot then cite the nature of the regime as an extra, contributing factor to the claim of just cause for war. If the nature of the regime is counting towards the claim that there is just cause for preventive war, we cannot count the nature of the regime a second time as a reason to wage war.

We should note that, in many cases, assigning real states to these ideal categories may not be a simple matter. For example, the state of Israel might display some characteristics of a liberal society - democratic elections - but at the same time have characteristics of an outlaw state (violation of UN resolutions) and of a hierarchical society (conflating citizenship with Jewish faith).[41]

The judgment of justifiability of preventive war by individual political entities turns on whether there are, in the international domain, equivalent institutional arrangements to the domestic rules prohibiting defensive preventive force by individuals but authorising some body or bodies to use preventive force.[42] Thus while so far I have been concerned predominantly with the question of what reasons can justify war, we now need to answer the different question: Who is authorised to resort to armed force?

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[41] For example, the 2010 proposal that those seeking citizenship pledge allegiance to a 'Jewish and democratic state', in 'Israel may force citizens to vow loyalty to a Jewish state,' *The Independent*, 8/10/10, http://www.independent.co.uk/news/world/middle-east/israel-may-force-citizens-to-vow-loyalty-to-jewish-state-2101006.html (accessed 13/10/10).

[42] And if those institutions fall short of the ideal, for example if the policing of rules is not viable, how we ought to act depends on whether we have a duty to bring about just institutions.

9. THE *JUS AD BELLUM* 'LEGITIMATE AUTHORITY' REQUIREMENT.

I have already - albeit briefly - treated issues to do with legitimate authority, for example in Chapter 7 and 8 regarding who can authorise acts of humanitarian intervention and preventive military action, and in Chapter 4 regarding the *levée en masse* – the right of the community to defend against invasion. In this chapter, I begin with an overview of the treatment of 'legitimate authority' in the Just War tradition. I then analyse the concept of authority that is in use here and argue that it is a question of who has permission to resort to force, and that the locus of this permission shifts depending on circumstances. This *jus ad bellum* conception of legitimate authority is embodied in the public rules concerning armed conflict,[1] and both consequentialist and deontological accounts can give plausible moral grounds for these rules. I will argue that the deontological account will depend on an appeal to a duty to will the peaceful resolution of conflict or to promote and preserve the institutions that bring it about, and a claim that the UN is such a body. However, morally speaking, the deontological account ascribes the locus of authority to states only insofar as they represent the people of the nation or political community; it is these people that are rightly the locus of this authority in cases of necessary defensive force. Whether these deontological considerations would recommend revision of public rules to reflect this, for example when considering a non-state community's right to resort to force, would need to take into account the consequences of such a change, particularly with respect to the duty to promote and uphold just peace. Finally, I address some compliance issues and empirical questions on the effectiveness of the public rules.

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[1] Note that here I am concerned with the content of these rules, not their genesis.

The Changing Conception of 'Legitimate Authority'.

The concept of legitimate authority has been consistently appealed to in works on war and conflict. Grotius clearly states the basic position: public war ought only to be waged with the authority of a supreme power. A supreme power is one that is not under the authority of any other.[2] For most writers this means that emperors, kings and princes with no temporal superior qualify as legitimate authorities to wage war. Christine de Pizan[3] broadens this to include Dukes and other landed lords, possibly to legitimise taking up arms in localised conflict with bands of brigands. Hostiensis includes the pope,[4] and Raymond of Penafort and William of Rennes similarly include clerics as legitimate authorities.[5] The latter writers amongst others[6] say that this authority can be delegated to lower officials. Some writers[7] specify that legitimate authority is also necessary to end war. By contrast, private individuals are not legitimate authorities to declare war. Transgressing the command 'Thou shalt not kill' is only allowed for those following the orders of those invested with legitimate power.[8]

However, many writers[9] draw a distinction between on the one hand offensive war or wars of choice,[10] and on the other hand, self-defence necessitated by the aggression of others. In the latter case lower authorities, communities and even (groups of) private individuals do have the authority to wage defensive war.

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[2] G.M. Reichberg, H Syse, and E Begby, eds. *The Ethics of War* (Oxford: Blackwell Publishing, 2006), 397.
[3] Ibid. p 213.
[4] Ibid. p 160.
[5] Ibid. p 133.
[6] Grotius, for example.
[7] Plato (Ibid. p 29), Raymond of Penafort and William of Rennes (Ibid. p 133), for example
[8] Ibid. p 120.
[9] Raymond of Penafort and William of Rennes, Hostiensis (Ibid. pp 160–1), Cajetan (Ibid. p 240), Vitoria (Ibid. p 311), Suarez (Ibid. p 343), Althusius (Ibid. p 381), Pufendorf (Ibid. p 458).
[10] There is a sense in which all wars are wars of choice, since one can choose to defend against aggression, or choose not to. The distinction made here though is between waging war in response to another's attack, or choosing to wage war when it is not necessitated by a attack by others. Such actions may include humanitarian intervention or preventive war. For convenience, I will use 'wars of choice' or 'elective war' as explained here.

According to Suarez war between the commonwealth and the prince can be legitimate even if it is offensive, if the prince is a tyrant (either by the way dominion has been obtained, or the manner of rule) and provided other constraints for just war are met.[11]

This marks a shift in thinking regarding the locus of legitimate authority. Vitoria argued that any commonwealth has authority to declare and wage war,[12] and that the prince has the same authority as the commonwealth.[13] He defines the commonwealth as a 'perfect community', meaning one that is complete in itself – it is not part of another commonwealth and has its own laws and independent policy.[14] Similarly, Grotius claimed that the 'common subject' of supreme power is the state. Peoples not under the sway of another people are a state; the proper subject of supreme power is one or more persons, according to the law of the state.[15] According to Vattel, it is the sovereign power that is entitled to make war; this power resides in the body of the nation and may, but not necessarily, be located in the king.[16] 'Nations or states are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security'.[17] So for these writers, the proper locus of legitimate authority to wage war lies with the political community.

A constantly recurring explanation[18] of the locus of legitimate authority to resort to force is that for those with no temporal superior, there is no superior common

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[11] Ibid. p 369.
[12] Ibid. p 311.
[13] Ibid. p 312.
[14] Ibid. p 312.
[15] Ibid. pp 397 - 8.
[16] Ibid. p 508.
[17] Ibid. p 506.
[18] Raymond of Penafort and William of Rennes, Pope Innocent IV (Ibid. p 149), Fulgosius (Ibid. p 229), Suarez (Ibid. p 343), Althusius (Ibid. p 381), and Grotius.

judge to settle their dispute. Conversely, an explanation[19] of the constraint – that the locus of legitimate authority to wage war (of choice) does not lie with private individuals – is that they do have recourse to a common judge.

Both Plato and Aquinas argue that a concern for welfare of the people also gives reason for the legitimate authority requirement. For the former, if military leaders are pious and just then overly violent or self-serving military campaigns may be avoided.[20] For the latter, authority of the prince is required because the common weal of the community is his concern, and it is his duty to rescue the needy.[21]

Aquinas also claims that this requirement is conducive to peace.[22] Vitoria quotes Augustine on this point; '[t]he natural order, being concerned with peace, requires that the authority and decision to undertake war be in the hands of princes'.[23]

Grotius explains the restriction of legitimate authority by appeal to public order. The state was instituted to maintain order, so although individuals have a natural right of resistance, the state has a 'greater right' over us to exclude that common right.[24] The focus here is on internal public peace and order, rather than peace between states. The National Conference of Catholic Bishops[25] also claims that competent authority – the right to declare war – has always been joined to the common good; war must be declared by those responsible for public order. In a democracy that means elected representatives.

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[19] Aquinas (Ibid. p 177).
[20] Ibid. p 30.
[21] Ibid. p 177.
[22] Ibid. p 177.
[23] Ibid. p 312.
[24] Ibid. p 399.
[25] Ibid. p 671.

The legitimate authority requirement is sometimes linked to efficiency. For Plato, 'commonality' is essential for rightful military order.[26] This is achieved by everyone considering 'the same person a friend or enemy as the city does'.[27] It is then left to the generals (the legitimate authority) to decide with whom the city is at war or peace.[28] For Aquinas the authority of the prince is required to wage war because individuals don't have authority to summon the people together.[29]

Finally, the legitimate authority for persons to wage necessary defensive war without waiting for a declaration of war from the leader of their political community (or any lesser officer to whom power has been delegated) is explained by appeal to the individual's right of self-defence.[30] Vitoria says that this right extends to the defence of property and goods.

Legitimate Authority as the Permission to Resort to Armed Force.

Now, since the term 'legitimate authority' can be interpreted in a number of ways, we need to clarify what conception is in play here. Raz[31] identifies three uses of the term 'authority': having the right to rule; to be an expert that can vouch for the reliability of particular information (theoretical authority); and having permission to do something that is generally prohibited.[32]

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[26] Ibid. p 30.
[27] Ibid. p 29.
[28] Ibid. p 30.
[29] Ibid. p 177.
[30] Vitoria Ibid. p 311, Grotius Ibid. p 402.
[31] J. Raz, "Introduction," in Raz *Authority* (New York: New York University Press, 1990). See also J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) for the dependence, normal justification and preemptive theses as an explanation of authority.
[32] Buchanan analyses 'political authority' as 'being morally justified in attempting to exercise a monopoly on the enforcement (or the making and enforcement) of laws within a jurisdiction' along with 'a correlative obligation to obey the entity said to be legitimate on the part of those over whom jurisdiction is exercised'. See A. Buchanan, "From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform," *Ethics* 111(4) (2001): 686n,

In the Just War tradition, permission to wage wars of choice is granted to only certain authorities (those above whom there is no superior magistrate). On the other hand, permission to wage defensive war necessitated by the aggression of others is granted to political leaders above whom there may be a common judge. Furthermore, under some circumstances groups of individuals can legitimately resort to force.[33] It is then the case that for the Just War understanding of legitimate authority, having the right to rule is not a necessary condition for justifiably resorting to force. (That is consistent with maintaining that having authority – meaning having a permission – is a necessary condition.)[34]

Raz presents the following moral thesis regarding the legitimacy of an authority:

> 'the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.'[35]

This links authority to the second use identified by Raz. Now, it may be the case that in many situations persons better comply with *reasons* which apply to themselves if they follow the directives of their political leaders regarding using armed force, rather than trying to follow the reasons which apply to them directly. However, this does not capture the whole of the Just War conception of legitimate authority. If legitimate authority is a necessary condition for resort to force to be just, and groups of individuals can justly resort to force without prior permission or instruction from political leaders, then it must be the case that groups of individuals

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[33] See Grotius and Vitoria above.

[34] Evans conflates these two conceptions; for example, in the same paragraph he writes of possessing 'the authority to launch the war' referring to possessing the right, while later he refers to the need for a 'precisely identified legitimate authority'. See M. Evans, "In Humanity's Name: Democracy and the Right to Wage War," in *Just War Theory: A Reappraisal*, ed. M. Evans, (Edinburgh: Edinburgh University Press, 2005), 71. Finlay, by contrast, clearly distinguishes between two aspects of authority; the 'moral right to declare a war justly', and the 'conventional ability to create a State of War' even in the absence of a just cause. States have both forms of authority, non-state entities do not have the latter. C.J. Finlay, "Legitimacy and Non-State Political Violence," *The Journal of Political Violence* 18(3) (2010): 301 & 303.

[35] Raz 1986, p 53.

can have legitimate authority to resort to force. So the conception of authority in use concerns more than the authority of one person over another.

Finally, Just War theory stipulates who has authority, meaning who has permission to do something that is otherwise prohibited (that is, to resort to armed force) and who does not. So it seems that the meaning of legitimate authority here is most closely associated with the third of Raz's three uses; it is this sense that will be the subject of the following section and the rest of this chapter. We ought to note here that qualifying 'authority' with either 'legitimate' or 'rightful' seems redundant in this use because understanding 'authority' as 'permission to do something that is otherwise prohibited' builds the notion of legitimacy into that use of 'authority'.

So, the core conception of the Just War 'legitimate authority' requirement concerns the question of who has the permission to wage war. More specifically, with reference to the Hohfeldian analysis of rights,[36] it addresses the issue of who can have the liberty to wage war. Only those leaders above whom there is no higher (temporal) power can have the right (liberty) to initiate wars of choice. For example, only they can have the right to choose to resort to armed force to support humanitarian intervention. By contrast, leaders of political communities can have the right (liberty) to wage defensive war; those leaders can have the right to resort to use of defensive force when that is necessitated by an armed attack. However, those leaders would be exercising that right on behalf of the political community, which is the true locus of the liberty to wage defensive war.[37] So in some circumstances it is the people of the community that can have the right to take the decision to wage defensive war. This liberty right could give the community the right to use armed force to resist an invading army without having to wait for their

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[36] See for example D. Rodin, *War and Self-Defense* (Oxford: OUP, 2002), 17.
[37] According to Vitoria, Grotius and Vattel, as above, and as I will argue below.

leader to give the order (a right to *levée en masse*). Also, the community could have the right to overthrow a tyrannical leader.[38] Note that if this latter act were seen as a right to initiate a rebellion, this would be contrary to the claim that only those above whom there is no temporal superior have the right to initiate war. This would not be the case, however, if the tyrannical leader were seen as bringing about a condition of war by his unjust conduct.

The liberty to wage war is conditional in the Just War tradition. Being the proper locus of the right to wage war is a necessary condition for resort to arms to be justifiable, but not a sufficient condition. The other *jus ad bellum* requirements (just cause, right intention, proportionality, prospect of success, and last resort) must be met for the legitimate exercise of that right.

The conditional nature of the Just War conception of legitimate authority can be highlighted by contrasting it with a Hobbesian account. In the latter the relationship between leaders of states is that of a state of nature;[39] sovereigns have an absolute liberty to do anything[40] in their dealings with other sovereigns that they judge to be the aptest means for the preservation of the state – including the liberty to wage war. So in the Hobbesian account there is no presumptive limit other than a prudential one. The right (liberty) to wage war that resides with sovereigns is not a conditional one.

The Legitimate Authority Requirement as Embodied in Public Rules.

The Just War account of the locus of the right to wage war is a moral claim. Contemporary international agreements contain prohibitions and permissions

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[38] I will treat this claim more fully at p 229 below.
[39] Thomas Hobbes, *Leviathan*, ed. E. Curley (Indianapolis: Hackett, 1994), 140.
[40] Ibid. p 79, p 113, & p114.

mirroring key aspects of the historical moral conception of legitimate authority. Firstly, the Just War claim that the highest judge has the right to initiate war is reflected in Chapter VII of the UN Charter:

> Article 42: 'Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.'[41]

On the other hand, leaders of states (for whom there is a common judge – the UN) cannot legitimately choose to resort to war as a means to conducting international relations; they do not have the right to initiate war. UN Charter article 2(4):

> 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'.[42]

The permission for states to wage necessary defensive war without referral to the highest authority (the UN) is reflected in article 51:

> 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.'

Kofi Annan reinforced the point that article 51 only permits use of force for necessary self-defence:

> '... it has been understood that when States go beyond that, and decide to use force to deal with broader threats to international peace and security, they need the unique legitimacy provided by the United Nations.'[43]

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[41] Article 41: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

[42] This and articles 41, 42 and 51 taken from: Charter of the United Nations, www.un.org/aboutun/charter/, accessed 23/3/08.

[43] Address to the United Nations General Assembly, 23 September 2003, cited by Crawford in M. Evans, ed. *Just War Theory: A Reappraisal* (Edinburgh: Edinburgh University Press, 2005), 42.

Finally, the liberty right of (groups of) private individuals to engage in necessary defensive armed conflict is confirmed in Article 13(6) of Geneva Convention I:

> 'Article 13: The present Convention shall apply to the wounded and sick belonging to the following categories... (6) Inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.'[44]

In sum, in cases of wars of choice legitimate authority lies with the UN, but for necessary defensive war legitimate authority lies with the state or even with private individuals within the state when there has not been time for leaders to organise the armed forces. The locus of legitimate authority shifts according to the circumstances.

Although I say that according to the public rules legitimate authority for elective war lies with the UN, we can make a finer grained distinction. Article 42 states that the Security Council can make the decision to use armed force. So we could interpret that as meaning that it is the Security Council that has legitimate authority, or alternatively that the UN has authority and the Security Council acts as a decision-making body on its behalf. The difference could be significant, particularly as there are other representative bodies in the UN (the General Assembly) that could, if given the chance, make different decisions. For the rest of this chapter I will leave that question open, simply referring to the UN as the locus of authority.

Johnson argues that the UN cannot have legitimate authority (and therefore 'cannot have a *jus ad bellum* in the fundamental Just War sense'[45]) because it

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[44] A. Roberts, and R. Guelff, eds. *Documents on the Laws of War* (Oxford, OUP, 2000), 202-3.
[45] J. T. Johnson, *Morality and Contemporary Warfare* (New Haven: Yale University Press, 1999), 61.

lacks the characteristics of a state that are necessary for sovereign authority and Just War legitimate authority. If correct, this would undermine the attribution of this right to the UN in 'positive law' – the agreements cited above. Later, I will argue that legitimate authority can, morally speaking, be ascribed to non-state entities.[46] So having the characteristics of a state is not a necessary condition for having legitimate authority to resort to force.

Moral Arguments for the Public Rules.

Accounts of the moral grounds of these public rules can be given from both consequentialist and deontological perspectives.[47]

From the consequentialist point of view the public rules concerning legitimate authority to engage in armed conflict would be the right ones (morally) if they were reasonably considered to be the best current attempt at rules having the aim that, with respect to minimising the harms of war, the expected level of actual compliance with those rules would lead to better consequences than the expected level of actual compliance with any alternative set of rules (or no rules at all). Or, if a satisficing formulation were preferred, the public rules concerning legitimate authority would be morally justified if, with respect to minimising the harms of war, the expected level of actual compliance with those rules would lead to good enough consequences.[48]

We should make it clear that this consequentialist formulation is not meant to give an action guiding decision procedure. Rather, it is meant to underpin institutional

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[46] Johnson does not clearly distinguish between different conceptions of 'authority'; for example, in 'without such [sovereign] authority there is no entity competent to determine just cause and undertake military action on its behalf' (p 61) he appears to draw on all three of Raz's uses.
[47] Merely appealing to Just War claims would be an inadequate argument for the moral grounds of these rules. We would then need an argument to support those claims.
[48] See Chapter 2.

design; it gives a consequentialist grounding of public rules, but those rules will still have a deontological 'feel'.

The standard deontological argument begins with a comparison with the domestic case: individuals have a moral right of self-defence. There is a right to defend life and wellbeing.[49] This means that when use of force is necessary to defend against unjustified aggression, agents are morally speaking permitted to use force without first gaining authorisation from any higher power. However, this moral right does not permit use of force where appeal can be made to a viable common higher power – the police or the courts – to resolve the problem.

On the deontological view, state agencies not only have the legal right, but may also have the moral duty (and hence the right) to use force where necessary to maintain internal public order. This could include for example the right to forcibly arrest an offender, provided all other justificatory conditions are met. An explanation of the state agency's moral right is that individuals would have the right to use force against offenders if there were no higher common power (in a 'state of nature'), but when there is such a legitimate[50] higher power (the state), individuals do not have the right and the state correspondingly gains the duty (and the right).

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[49] Coates similarly grounds his argument for the derivation of 'legitimate authority' in consideration of the individual's right to self-defence. However, he moves too quickly to talk of a moral right to citizen's arrest and a state's corresponding right to engage in wars of choice. He claims that when acting in self-defence the individual or a state acts as a 'representative of the community and an upholder of the law' (p 127), and this characterisation of an action can also justify citizen's arrest and elective war. He does not consider the conception of authority with the locus shifting according to the nature of the (otherwise prohibited) act. See A.J. Coates, *The Ethics of War* (Manchester: Manchester University Press, 1997), 127.

[50] I will not enter here into the question of what conditions must obtain for coercive power exercised by the state over its citizens to be legitimate.

States also have a moral right to necessary self-defence, encompassing a right to defend the community's existence, integrity and political self-determination.[51] As with the domestic case, states do not have the right to choose to use force against others where it is not necessary defensive action, because in such cases they have recourse to a common magistrate – the UN – for resolution. An explanation of the UN's moral right and duty to use force where necessary to maintain or restore peace and security is that prior to its formation, states had the right to choose to use force as a means in international relations (because there was no higher magistrate), but once the UN came into being, states no longer had this right and the UN correspondingly gained the right and duty.

So according to this deontological account, it seems that these moral rights of states and the UN can give moral grounds for the public rules embodied in UN Charter articles 2, 42 and 51. However, in the following, my analysis of the locus of the authority to choose to use force shows that this cannot be the whole of the deontological account of the current public rules. First, I will argue for a moral duty to obey the current public rules under non-ideal conditions. I will further argue that from the deontological view the right to resort to force inheres in the state only insofar as it represents the encompassing group, and it is the latter body that is (morally speaking) the true locus of 'legitimate authority' for necessary defensive force.

One type of elective war or war of choice under recent discussion is humanitarian intervention. Much of this debate has been concerned with whether this is just

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[51] Rodin argues against this in *War and Self-Defence* (Oxford, OUP, 2002), and I defend this claim in A. Lamb, "Self-Determination, Wellbeing, and Threats of Harm," *Journal of Applied Philosophy* 25(2) 2008, and here in Chapter 6. I argue there that we should also recognise this right of self-defence for political communities that meet the 'encompassing group' criteria.

cause for use of armed force. I have argued that it is. However, according to the public rules the locus of the legitimate authority to instigate that action would be with the UN and only the UN. That is clear from the Articles 2(4) and 42.[52]

For the deontological account, only the UN has moral authority to initiate humanitarian intervention or other 'wars of choice' because the existence of the UN as a common judge in international affairs means that states do not have the moral right to choose to wage war. They (morally) ought instead to appeal to the UN as magistrate.

Now, suppose the UN to some extent failed in its function of magistrate that can settle matters of international relations. This failure could occur in at least three ways: powerful states acting without the authorisation of the UN[53] (for actions that ought to be only permitted on its authority) with impunity; or states acting contrary to or ignoring decisions of the UN, again with impunity;[54] or thirdly, the UN simply being negligent of its duty.[55] In these cases, if morally speaking the authority to choose to resort to force in international relations lies with the highest power above whom there is no common judge to settle the matter, then on the account given so far that moral authority would lie with the leaders of states.[5657]

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[52] Unless the concept of self-defence against armed attack is stretched to include, in the case of humanitarian intervention, other-defence.

[53] For example, the NATO intervention in Kosovo, without UN authorisation. See Buchanan 2001, op. cit.

[54] Lang refers to Johnson and Weigel's claims that the Security Council has neither *de jure* nor *de facto* capacity to govern, in A.F. Lang, "Punitive Intervention: Enforcing Justice or Generating Conflict?" in *Just War Theory: A Reappraisal* ed. M. Evans, (Edinburgh: Edinburgh University Press, 2005), 63.

[55] These are not meant to be mutually exclusive. Two, or all three of these situations could occur in a single case.

[56] Raz distinguishes between (i) legitimate authorities which are there by right – they have the right to act as authorities – and (ii) mere *de facto* authorities that do not, but claim the right of an authority, and (iii) naked power, which does not make this claim. He claims that the conditions that must obtain for legitimate authority include that it is a *de facto* authority. Only those who have real power can be legitimate authority. See Raz op. cit. p 2 – 3.

[57] In some contexts authority will lie with leaders of political communities, as I will argue below. Lefkowitz argues that moral authority to use armed force can also lie with military commanders when their political leaders fail to act on a duty to rescue. D. Lefkowitz, "Debate: Legitimate

Furthermore, a lawbreaker (in respect to public agreements on legitimate authority) could then claim that they were in fact a conscientious law-breaker, and their actions not a subjective imposition of their values on others. Rather, those actions are justified by the set of values that it is agreed are supposed to be embodied in the law.[58] The claim that the locus of legitimate authority lies with states may be contrary to international agreements but actually (they may claim) is a better expression of the moral values underpinning the system that is currently failing in its realisation of those values.

According to the consequentialist account of the moral grounds of these public rules, the rule that only the UN could authorise humanitarian intervention or other elective wars would be judged according to my consequentialist formulation. Suppose again that the ability of the UN to act as magistrate were challenged, for the reasons stated above. Then for the consequentialist it would not necessarily follow that moral authority would then lie in the leaders of states. For example, it may be the case that the morally right action would still be to act in accord with the public rules; in this case, the rule that permission to choose to wage war is limited to the UN, even when the capability of that body is in question. This may be because if leaders of states were permitted to initiate elective war this would lead to more wars, the harms of which would outweigh the harms they were supposed or purported to prevent.[59]

Authority, Following Orders, and Wars of Questionable Justice," *The Journal of Political Philosophy* 18(2) (2010): 218-227.

[58] See Buchanan 2001 op. cit. p 694 & p 697.

[59] With a weak UN the (consequentialist) reasons for complying with rules that assume an effective UN may still hold (just as with an imperfect domestic police force the reasons for complying with the law still hold). But then there will be a certain degree of ineffectiveness at which the background considerations that were assumed in the public rules simply fail to hold, and then the reasons to continue to comply with the rules are questionable at least, on those same consequentialist grounds. To continue the domestic analogy, if a domestic police force were to become completely ineffective, then reasons to follow public rules that assumed their proper functioning would be questionable.

Of course, that latter claim would also not necessarily be true. But the point is that if the claim that the UN is not properly fulfilling the role of magistrate were accepted – or at least to the degree that it was accepted – then for the deontological argument the locus of moral authority to initiate war would shift from the UN to individual states; and for the consequentialist argument, that would not be necessarily the case.

That would be a worry for the advocate of moral rights. If political leaders of states claimed they had the moral authority to engage in wars of choice without having to seek permission from the UN, then predictably this would further undermine the latter body.[60] And if any credibility is given to the UN's potential to achieve its aims,[61] then undermining the UN would undermine the goal of protecting rights. So it would seem that those interested in moral rights might be better off championing the consequentialist account of the moral grounds of public rules concerning the locus of legitimate authority to wage war.

However, the deontological account of the locus of legitimate authority presented so far is incomplete for the following reason. My argument above suggests that states could (morally) divest the UN of authority simply by ignoring it. It suggests that if they acted in certain ways then they would not incur duties that would be associated with the existence of an effective higher magistrate; and they may have self-interested reasons so to do. This might be convenient for them, but the conclusion that they are morally permitted to do so can be challenged with a

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[60] Not only undermine its credibility and viability, but if these actions were viewed as establishing new customary norms, they would undermine the content of existing agreements which place the locus of legitimate authority with the UN. For example, it is claimed that the decision to invade Iraq in 2003 would have a destabilising effect on the UN, http://www.guardian.co.uk/uk/2010/sep/30/iraq-war-inquiry, accessed 16/1/11

[61] See, for example the 'Preamble' to the UN Charter: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind... to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained...'.

further deontological argument. So far, I have the appealed to a right to self-defence along with a contractarian account of the shift to the UN of the locus of the legitimate authority to choose to use force. In addition, a moral duty to obey the current public rules under non-ideal conditions could be grounded in a permanent duty to will the peaceful resolution of conflict, or a duty to promote and preserve the institutions that bring it about.[62] States acting in a way that undermined the efficacy of the UN would fail in that duty.[63] And by failing in the duty, they do not divest themselves of that duty.

An objection can be raised against my argument at this point. I have claimed there is a duty to promote and preserve institutions that bring about peaceful resolution of conflict, and preserve peace. Is this just an *ad hoc* proliferation of moral principles to 'shore up' morally the public rules?

This objection can be met by drawing on a Kantian argument. States are entitled to use defensive force; that is, use force against an aggressor. If that entitlement is one that is equally enjoyed by all parties then there must be some objective standard. This is because the judgment of the reasonableness of any particular use of defensive force (and the judgment of whether the use is defensive) cannot be made unilaterally by any party to the dispute. If that were the case, two states acting in good faith could each simultaneously judge that they were entitled to use defensive force to counter the other's perceived threat.[64]

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[62] Emerton and Handfield assert as a matter of fact that even if the UN enjoys authority, it is not an effective authority. By contrast, I am arguing that there is a duty to promote it as a viable authority. P. Emerton, and T. Handfield, "Order and Affray: Defensive Privileges in Warfare," *Philosophy and Public Affairs* 37(4) (2009): 398.

[63] It is true that agents representing the UN sometimes act wrongfully (for example, those engaged in peacekeeping operations becoming involved in child abuse, as widely reported in UK media in 2008), but that does not undermine the claim that the UN is a minimally just institution any more than isolated wrongful acts by individual police officers would thereby render a state regime unjust.

[64] A. Ripstein, *Force and Freedom* (Cambridge Massachusetts: Harvard University Press, 2009); 227.

The solution to the indeterminacy of the entitlement to use defensive force is that states ought to submit themselves to conditions where their entitlements are guaranteed.[65] That is, they have a duty to bring into being and support a federation of nations that can establish procedures for settling disputes. Now, the goal of such a federation is peace and hence the aim is to provide a court where disputes can be settled without resort to war.[66] So while this argument may lead us to the duty to support institutions that replace war with negotiated settlements,[67] it does not yet establish those institutions as the locus of legitimate authority to resort to force. Here we can note that for Kant the duty to submit to a free federation of states is preceded by the requirement that "[t]he civil constitution of each state shall be republican".[68] This is because republics are less likely to choose to resort to war, and so are conducive to peace. However, in non-ideal conditions there will remain Outlaw States that are prepared to initiate war. In those conditions, there will be a need to determine when resort to force would be justified, and authorise use of armed force where judged necessary. If the UN can fulfil this judicial role (or at least has the capacity to do so), then political leaders have an obligation not to undermine the UN. So the duty to support a 'league' or 'congress' of states arises from the right to use defensive force. Since I have argued for this right in Chapter 6, there is no *ad hoc* proliferation of moral principles.

Evans responds differently to the problem of the interpretation of the 'legitimate authority' requirement in our non-ideal world where the UN does not always

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[65] Immanuel Kant, *Perpetual Peace: A Philosophical Essay*, translated with Introduction and Notes by M. Campbell Smith, with a Preface by L. Latta (London: George Allen and Unwin, 1917), 128, http://oll.libertyfund.org/title/357 (accessed 25/10/2010).
[66] Ripstein p 229.
[67] F. Rauscher, "Kant's Social and Political Philosophy," *The Stanford Encyclopedia of Philosophy (Fall 2008 Edition)*, Edward N. Zalta (ed.), http://plato.stanford.edu/archives/fall2008/entries/kant-social-political/, (accessed 27/10/10).
[68] Kant, op.cit. p 120.

function as an effective magistrate. Given the 'deficiencies in the international system'[69] the legitimate authority requirement cannot be as decisive as it was intended to be; there enters a kind of indeterminacy regarding it, by which he means that it can be 'waived without rendering a war unjust'.[70] So for him, legitimate authority is no longer a necessary condition for resort to force to be morally justifiable.

I agree with Evans that it may be possible for resort to force to be in violation of the public rules regarding legitimate authority, but still be assessed morally justifiable. However, his conclusion that the moral requirement of legitimate authority can be waived does not follow.[71] He makes the following error: from the claims that (i) agent A is not authorised in law to initiate act X, but (ii) agent A is morally justified in Xing, he concludes that (iii) the moral authorisation to X is not necessary for Xing to be justified (he quite clearly refers to the Just War theory legitimate authority criterion[72] which of course is a moral theory, rather than the embodiment of it in the public rules). This argument is invalid. His mistake arises from (i), where he conflates the Just War (moral) criterion with the content of the public rules. While recognising that an act could be illegal but morally justifiable, he does not recognise that in non-ideal conditions the loci of the moral permission and the legal permission (the conditional right, as I have argued we ought to understand legitimate authority) could differ. That is, it could be the case that the conditional permission legally lies with the UN but morally lies with the state. For example, consider Rwanda in 1994. In the public rules the authority to intervene to prevent or halt the genocide lay with the UN. However, the UN failed in its

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[69] Op. cit. p 72.
[70] Ibid. p 85.
[71] There is also a worry that Evans does not sufficiently address the problems arising from the moral justifiability of breaking the law, which I have addressed by considering the Kantian obligations above.
[72] Ibid. p 85.

responsibility to act on the duty to rescue.[73] In the light of this failure, if another agent were in a position to undertake rescue then morally speaking they would have permission to do so.[74] For the action to be justifiable the reasons for acting on that conditional moral right would have to outweigh the moral duty to obey the current public rules and the duty not to undermine the UN.

Legitimate Authority and Non-State Communities.

I will now consider cases in which a non-state community resorts to force in the attempt to procure political self-determination. In fact, I refer to a variety of possible cases here. These include: an oppressed national minority established within the territory of an existing state, which seeks secession from that state; conflicts involving a nation seeking to liberate its people and territory from foreign (colonial) rule; a community seeking to procure or secure a territory and self-determination; and two or more communities within a state competing to be the ruling power of that state.

Again the question of interest here is not whether any of these causes could rightfully be considered a just cause,[75] but rather whether any non-state communities[76] in these cases would qualify as having legitimate authority to resort to armed force. Firstly, we need to consider the identity of the entity to which we are putatively ascribing authority.

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[73] UN Publication, "Inquiry finds UN failure to halt 1994 genocide," Africa Recovery 13(4) (1999), http://www.un.org/ecosocdev/geninfo/afrec/subjindx/134peac2.htm. (Accessed 26/10/10).
[74] So, the French initiative 'Operation Turquoise' could have been morally permissible even if the UN had not authorised it through Resolution 929. UN Resolution 929 "Establishment of a temporary multinational operation for humanitarian purposes in Rwanda." (1994), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N94/260/27/PDF/N9426027.pdf?OpenElement (accessed 26/10/10).
[75] I argued in Chapter 6 that defending against threats to a political community's self-determination constitute a just cause to resort to armed force.
[76] Or leaders of these communities.

In the following I will consider the view that the community (encompassing group) ought to be taken as morally primary. Correspondingly, states have legitimate authority morally speaking only where they are properly agents of the community. So I am relying on the supposition that the idea of the collective of persons is distinct from that of the state. I have already given some characteristics of the encompassing group,[77] but now I will try to draw out some relevant differences between the state and the collective of persons. Buchanan refers to the state as 'a persisting structure of institutions for the wielding of political power'.[78] Rawls[79] draws on Mill's conception of a nation: united by common sympathies, they cooperate with each other more willingly than with others and want the same (self-government). These feelings may be the effect of race and descent, common language or religion, issues of territory, and shared national history (pride and humiliation, pleasure and regret).[80]

Walzer gives some idea of what it might mean for the state to be properly agents of the community, and what characteristics these communities might have. 'The national club or family is a community different from the state'.[81] '[W]here the state represents a nation largely in place, another sort of commitment commonly develops, along lines determined by the principle of nationality.'[82] '[T]he political community is probably the closest we can come to a world of common meanings. Language, history, and culture come together (come more closely together here than anywhere else) to produce a collective consciousness.'[83] Finally, they are

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[77] In Chapter 6 above; "Members of these groups share a common culture and character, individuals growing up in the community acquire the group culture, membership is by mutual recognition, is a matter of belonging, not achievement, and is the prime way in which members are identified. Finally, they are not small 'face to face' personal groups, but are larger 'anonymous' groups".
[78] A. Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford: OUP, 2004), 237.
[79] J. Rawls, *The Law of Peoples* (Cambridge Massachusetts: Harvard University Press, 2001), 25n.
[80] Ibid. p 23.
[81] M. Walzer, *Spheres of Justice* (Oxford: Blackwell Publishers, 1983), 52.
[82] Ibid. p 41.
[83] Ibid. p 28.

'communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life'.[84]

Bader argues that Walzer links state sovereignty, as the appropriate unit of political decision-making, to 'communal self-determination'.[85] But according to Bader, Walzer does so by presupposing states to be what they are not – 'linguistically and culturally homogeneous worlds of common meaning, free associations based on democratic consent'.[86] The following argument will agree with Bader, at least from a moral point of view. But importantly, given that I am arguing for the moral primacy of the community rather than the state, Walzer does give us some ideas regarding which characteristics of a non-state community might identify it as the locus of legitimate (moral) authority to resort to force.

A further problem arises when we consider that the encompassing group will make some claim to land. It may be the case, however, that the community are not the sole occupiers of a distinct and contiguous territory. There would then arise a trade-off between the integrity of the identity of the community, and the need for workable state boundaries. If we focus on plausible, viable territorial boundaries, then it is likely that wherever those boundaries could be agreed, members of the encompassing group will lie outside the territory, and persons who are not members of the encompassing group will lie within the territory. So while it was the nature of the encompassing group that was the rationale for ascribing rights, this is not the entity to which that permission is now ascribed. Furthermore, if the encompassing group desiring secession is identified by an ethnic homogeneity,

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[84] Ibid. p 62.
[85] V. Bader, "Citizenship and Exclusion: Radical Democracy, Community, and Justice. Or, What is Wrong with Communitarianism," *Political Theory* 23(2) (1995): 221.
[86] Ibid. p 221.

this would entail problems for persons not in the group but in the territory. Foreseeably they would either be discriminated against or suffer coerced emigration,[87] and as we saw with Buchanan's theories of secession,[88] international law should not encourage actions that undermine principles of morality. Finally, if the political entity is defined by territorial boundaries, then claiming a 'will of the people' (to secede) is question-begging, since the identity of the community is a construct of that boundary-drawing.[89]

If on the other hand we prioritise the identity of the encompassing group, then trying to draw territorial borders that corresponded with that community would result in enclaves of micro-communities both within and without the territory, and rambling unworkable borders. It seems that appeal to a right to self-determination for non-state communities - and permission to resort to force to procure that content of the right - raises legitimate questions about the relationship between territorial boundaries and the right's legitimate bearer; I will not attempt to give a definitive answer to these here.

Now, even if non-state political communities had just cause to resort to armed force, from the viewpoint of the public rules considered above[90] they do not have legitimate authority to do so. On consequentialist grounds, the moral judgment of these public rules would appeal to their outcome.[91] For a deontological account of the moral grounds, these rules could be supported by a claim that leaders of these communities do not have moral authority to choose to wage war because there is

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[87] M. Mann, *The Dark Side of Democracy* (Cambridge: Cambridge University Press, 2005): 55-69.
[88] p 164 above.
[89] Z. Oklopcic, *The Independence of Kosovo: between Self-Determination, Territorial Rights and Functionality* (unpublished), 9 http://eis.bris.ac.uk/~plcdib/territory/papers/oklopcic_kosovo.pdf (accessed 27/10/10).
[90] UN Charter Articles 42, 2(4) and 51.
[91] That is, they would be the best rules if they were reasonably considered to be the best current attempt at rules having the aim that, with respect to minimising the harms of war, the expected level of actual compliance with those rules would lead to better consequences than the expected level of actual compliance with any alternative set of rules (or no rules at all).

a higher magistrate to whom they can appeal. However, in reality things may not be as straightforward as this. For example, it may be that there is no effective higher authority acting as impartial judge or magistrate to resolve the dispute.

Normally, for the internal affairs of a state there will be some institution that functions as the highest power that can take decisions on disputed issues. This may be a single political leader, or some body of leaders. But for the scenarios considered here that cannot be (morally) right as these leaders are (*ex hypothesi*) one party to the dispute. They are not a higher common power. So perhaps such a problem ought to fall under the jurisdiction of the UN (perhaps the ICJ).[92] Suppose it were judged that morally speaking, that ought to be the case. If the UN then failed to fulfil this role, or states simply ignored or resisted any mandates or judgments, then it may be that there would be no effective (impartial) superior magistrate. (A further possibility is that parties could nominate an arbitrator whose authority they are willing to acknowledge; that arbitrator could be another state, or a religious authority. In that case, even if there were no effective superior magistrate, there would be a recognised impartial magistrate.)

Perhaps these considerations may lead us to argue that morally speaking the leaders of non-state communities ought to be considered, in some circumstances, to have legitimate authority to resort to armed force. Or, that in conditions where leaders of the community are not able properly to organise for conflict, then legitimate authority lies with the people of a non-state community.

The Christian doctrine concerning the right to revolt may lend support to this conclusion. Revolt could be justified if the government were guilty of sufficiently

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[92] A further problem here could be that of some procedure for determining whether it is an internal or international affair.

grave rights violations, all other means to redress had been tried and failed, and there were high probability of success.[93] This account attaches moral primacy to the community, which is the body that is really authorised to take action; the state is merely an effective means. Where the latter is incapable of acting the community may be justified in acting of its own accord. The right to wage war inheres in the community.

The right to revolt is contested. For example, for Hobbes in any dispute between the sovereign and the people, the former's authority is final and absolute. To seek some higher authority to settle disputes would lead to an infinite regress; or to allow the people to question the sovereign's authority would return all to a state of war.[94] Flikschuh argues that for Kant there can be no political right to revolution because revolution is a breakdown of the political relationship.[95] From both points of view, the sub-state entity does not have permission to take up arms against the state.

We can begin to respond to both positions, on their own terms. First, for Hobbes the individual has the liberty to defend themselves even against the sovereign. So each individual could consider themselves to be exercising this right if state oppression were taken to be a sufficient threat.[96] Further, political leaders of different states are taken to be in a state of nature regarding each other. If morally speaking we consider that a community ought to be considered a distinct entity from the state from which it desires to secede, then from that moral point of view

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[93] L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Leiden: Martinus Nijhoff Publishers, 2006), 48.
[94] T. Hobbes, *Leviathan*. Edited by E. Curley (Indianapolis: Hackett, 1994), XVIII.
[95] K. Flikschuh, "Reason, Right , and Revolution: Kant and Locke," *Philosophy and Public Affairs* 36(4) (2008): 396.
[96] Hobbes XIV 29 & XXI 11-13.

we might consider use of force permissible.[97] A similar argument can be raised regarding the Kantian position. While the association of individuals within the state is binding, between states it is voluntary. So again if the community in question ought to be considered a morally distinct entity, then that community is not bound by the authority of the state. Additionally, Ripstein argues that, for Kant, revolution can be permissible under conditions of barbarism, understood as force without law and freedom. Nazi Germany is an example of such a condition.[98] As with secession, ascription of right to revolt raises questions concerning the identity of both the community itself and the entities with which it is in conflict.

In the public rules there is no counterpart to the moral judgment that the authority to use armed force inheres in the community.[99] It is true that international humanitarian law recognises non-international armed conflict as a condition distinct from other forms of common criminal internal violence. Geneva Convention Common Article 3 sets out prohibitions and duties in 'conflict not of an international character', and the Additional Protocol II and the ICTY are concerned specifically with non-international armed conflict. However, the 1949 Geneva conventions only apply in civil war if the government of the state in which the conflict takes place, or another state, recognises the belligerent status of the community that resorts to armed force.[100] Moreover, the subject matter of Protocol II is conduct in conflict, and similarly the ICTY deals with war crimes and crimes against humanity, not crimes against peace.[101] Hence both are concerned with *jus in bello* considerations, not the *jus ad bellum* requirements.

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[97] Or perhaps conclude that morality does not apply to their relationship, and so they have a liberty to resort to force.
[98] Ripstein, 325-352.
[99] That is, I cannot find anything that recognises non-state communities as having legitimate authority to resort to armed force.
[100] Roberts & Guelff, op. cit. p 481.
[101] Ibid. p 566.

There are at least two ways in which this moral conclusion - that the locus of legitimate authority to resort to force could lie with non-state communities - could be reflected in the public rules. If the 'Members of the United Nations' could include non-state communities, then UN Article 51[102] would recognise the latter's right to self-defence if an armed attack occurs. Alternatively, Article 51 could extend that right to non-state communities recognised in some way by the UN. Both solutions have institutional implications, either for qualification for membership of the UN, or some framework and criteria for identifying those communities that could have legitimate authority to resort to armed force.

Of course, it is possible that recognising non-state communities as having legitimate authority to resort to armed force would result in more frequent wars. Most worrying would be if, by lowering the bar of permissible resort to force, those amendments made morally unjustified use of force more likely.[103] If that were so, then the deontological argument would have to take into consideration the duty to seek peaceful resolution to conflict and to support institutions that maintain peace. And that may recommend supporting the current rules. As with the consequentialist argument, we cannot avoid the need to assess the impact of the public rules.

Finally, we ought to be aware of a range of cases that would be even more challenging to the formulation of public rules. For example, trans-state groups such as Kurds; or some transnational/trans-state group that is dispersed through a larger community and therefore lacks a territorial base; Roma, and Jews prior to 1948 may be relevant examples here. Another challenging case would be a state

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[102] 'Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations.'

[103] Note that while this works as a counterargument to the deontological account this would not be so for the consequentialist grounding; it would just be one of the consequences to take into account.

claiming the right to speak for all members of the nation or the people everywhere, even if they happen to not be within the territory of the state (for example, Nazi Germany claiming the right to speak for Germans everywhere).

I will now draw attention to some compliance issues, and empirical questions on the effectiveness of the public rules. A possible objection to the consequentialist account is a counter-claim that it is not true that non-state communities would refrain from conflict simply because in the public rules, they did not have authority to initiate one. If such a community were under threat, so the objection goes, and the leaders or members of the community judged themselves justified (according to other *jus ad bellum* criteria - most importantly, just cause) in resorting to defensive force,[104] then the absence of a form of words in the law granting them the authority to make such a choice would be unlikely to restrain their actions. As before, this is an empirical claim. But insofar as it is plausible, it would seem that the consequentialist reasons for public rules in which non-state communities do not have legitimate authority to resort to force can at least be questionable.

Supporters of the current public rules could respond with a further claim that changing those rules such that they identified leaders of non-state communities as having legitimate authority to wage defensive war could result in a greater likelihood to use armed force. Support for this case would come from the thought that if there were an explicit recognition that (leaders of) some such communities had legitimate authority to resort to armed force, then in situations of uncertainty (borderline cases) they may be more likely to judge that other justifying conditions (just cause, proportionality, or last resort, for example) had been met.

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[104] They also may consider that violating the law is justified because they believe that the law itself is not just. While Buchanan 2001 deals more specifically with law-breaking with the intention of reforming an unjust law, his guidelines (except 5, 7 and 8) on p 698 are relevant here too.

Underlying these arguments are two related questions. The first concerns whether the existence of rules that say that non-state communities do not have authority to resort to force influences decision-making. More specifically, whether at least some such communities choose not to use force because of that rule. The second question is whether a rule granting authority to those communities would influence decision-making. Specifically, whether the existence of such a law might encourage some communities to resort to force. These are empirical issues, which in the end require empirical answers.

Other worries about consequentialist considerations and the effect of the existence of rules arise for the issue of states and the authority to wage elective war. In so far as states become involved in *de facto* undeclared wars, the existence of rules stipulating who has authority to choose to wage war and in what circumstances may seem to become irrelevant. States become embroiled in armed conflict regardless of the public rules. But as before, it may be that while not granting authority to states to engage in wars of choice does not prevent them from doing so once a decision to engage in armed conflict has been reached, granting such authority could colour those deliberations such that decisions to resort to force would be made more frequently. And as before, these are empirical issues.

Finally, we can question the effectiveness of the UN as a magistrate that can assure that rules do not merely exist, but that those rules also govern behaviour. The United States for example only accepts jurisdiction of the ICJ on a case-by-case basis, so effectively does not recognise it as a higher authority.[105] Where such a powerful agent does not recognise this organ of the UN, then the claim that the UN can function as a higher authority, particularly for disputes involving the

[105] See http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3 for a list of states recognising the jurisdiction of the ICJ. The United States is not included.

US, is questionable. So while consequentialist considerations for the public rules regarding legitimate authority will appeal to the benefits to be reaped from the expected level of actual compliance, the current criticisms claim that those rules are not leading to beneficial consequences because they are not affecting how agents behave in the real world.

In response to that we can admit the messiness of the world, which will inevitably have non-compliance problems. However, provided the public rules have some influence on the actions of agents, then if the influence of those rules can reasonably be supposed to lead to better consequences than any other rules we can think of (or none at all), then those rules would be supported by the moral argument. So the reply to the pessimist would be to challenge them to draw up some better set of rules regarding legitimate authority that they think would lead to better outcomes.

10. CONCLUDING REMARKS.

The Just War tradition treats constraints on the decision to resort to war, and constraints on actions in war, as two distinct and independent domains of ethical consideration.[1] I have sought firm, secular, moral foundations for public rules (international law, treaties, conventions etc) in these two spheres of action. My analysis is, however, not merely an apology for those rules; I argue for new interpretations and in some cases changes of the rules. These include:

1) Recognising rights of encompassing groups to necessary self-defence (Chapters 6 and 9). This would mean that provided members of these groups do not violate *jus in bello* constraints, they ought to have moral and legal impunity for such acts (so proportionate and necessary harms that do not violate the principle of discrimination are treated as legitimate acts in war, not criminal offences).

2) Recognising a duty to rescue (humanitarian intervention, Chapter 7). Work is already underway with the responsibility to protect agenda, but I argue that there is greater chance of convergence on my more limited duty to rescue.

3) Prohibiting remote weapons systems and tactics (including high-altitude bombing, even of legitimate targets, if the target is in proximity of civilian population) if they are shown or foreseen to be not sufficiently discriminating (Chapters 4 and 5).[2] The idea that weapons and tactics that are not sufficiently discriminating should be prohibited is not new; the 1977 Geneva Protocol 1 states

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[1] Note though that I have said that the law concerning *levée en masse* suggests that *jus ad bellum* and *jus in bello* are not independent. There is also the emerging field of *jus post bellum*.
[2] This would raise concerns regarding the much-debated topic of the threat to use strategic nuclear weapons.

that '[t]he right of the Parties to the conflict to choose methods or means of warfare is not unlimited'.[3] My contribution here is that it is on this issue (discrimination) that we ought to be evaluating weapons and tactics that asymmetrically remove risk, not on the issue of asymmetric risk-removal itself.

4) Considering *all* persons neither in uniform nor bearing arms as noncombatants and therefore fully immune from attack. This rules out 'targeted' or 'named' killings, and rules out discounting the value of lives (on the basis that they are morally culpable with respect to unjustified harms) when considering collateral harms (Chapter 4).[4]

5) Considering all persons who bear arms to have combatant rights (POW status, for example) (Chapter 4).

If we judge these recommendations by Buchanan's four criteria for introducing new legislation,[5] we get mixed results. First, while all these suggestions have emerged from moral principles that, I have argued, underpin existing public rules concerning armed conflict, recommendations 1 and 2 are not consistent with well-entrenched principles of international law. Second, my arguments in Chapter 1 and the case study in Appendix 2 also suggest cross-cultural appeal and moral accessibility, and no requirement for adherence to particular religious beliefs.

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[3] Article 35(1), Roberts, A. and Guelff, R. eds., *Documents on the Laws of War* (Oxford: OUP, 2000), 77. This is echoed, for example, in the Red Cross Fundamental Rules '[p]arties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare (ibid. 514). Substance is given to these prohibitions in, for example, the 1980 UN Convention on prohibition or restriction of certain weapons (ibid. 515).

[4] This is an interpretation of 1977 Geneva Protocol 1 Article 50 (ibid. 448), in relation to who is and who is not a legitimate target. My point 5 is an interpretation of Protocol 1 Articles 43 and 44 in relation to who has combatant rights. As I have noted, these interpretations entail that some persons may not be legitimate targets, but have certain combatant rights such as POW status.

[5] p 164 above. Consistency with well-entrenched principles, cross-cultural appeal, not encouraging moral or legal wrongs, and prospect of implementation.

Third, however, I have said in Chapter 4 that if suggestions 4 and 5 were to be accepted in law, they could encourage actions that undermine principles of morality or international law. But before rejecting them for that reason, we ought to weigh that harm against the problems with current interpretations of the combatant / noncombatant distinction – particularly compliance problems and the breakdown of the principle of discrimination. Furthermore, I have argued that these recommendations could go some way towards ameliorating the tension between rightness and fairness that can arise when there is a wide disparity in the conventional military strength of belligerent parties.

Fourth and finally, since points 3 – 5 amount to an interpretation of current law, that counts in their favour in terms of having a 'significant prospect' of being implemented in international law.

Just War Theory and Pacifism.

Anecdotally, Just War theory is suffering from a 'bad image'. The politicians' appeal to Just War in the run-up to military campaigns in Afghanistan and particularly Iraq have led to a public image that this is a theory for warmongers. This is the reaction that I have all too often met at public lectures and debates.

For this reason, it is worth reinforcing that *jus ad bellum* sets out the conditions that must be met for resort to force to be permissible. If it were the case that those conditions were rarely, perhaps never, fulfilled, then the theory would be compatible with a contingent form of pacifism. Furthermore, suppose we thought that in some cases those conditions were met. Since this yields a permission rather than an obligation to use armed force, there is no tension between Just War

theory and the choice of individuals or communities not to use armed force. As Mollendorf[6] puts it, " [i]n selecting one course of action others close. It would not be absurd to argue that even a just war ought not to be prosecuted because of the moral costs of doing so."

My approach can be roughly summed up: we try to prevent parties from getting into conditions of war by prohibiting use of armed force except in self-defence or to rescue others. This is the subject matter of the *jus ad bellum*. If all parties abided by this there would be no war, and therefore no need for rules regulating conduct in war. But given the reality that this is not the case and war does happen, we also need rules that try to minimise the rights violations when conflict does occur. This is the subject matter of the *jus in bello*.

A Just War approach is compatible with the thought that international laws concerning armed conflict ought to be grounded in humanitarian aims.

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[6] D. Mollendorf, "Jus ex Bello," *The Journal of Political Philosophy* 16(2) (2008): 129. Mollendorf does not present this as an endorsement of pacificism; rather, he makes the point that other aspects of international morality or justice can be in tension with Just War principles.

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APPENDIX 1

Just War Theory: a Very Brief Summary.

Just War theory provides a framework for contemporary thinking on the ethics of warfare. It has two components. The first, *jus ad bellum*, sets out conditions concerned with the moral justification of resorting to war, the decision to use armed force. For war to be permissible, there has to be:

(a) a rightful authority to wage war;

(b) a just cause to wage war;

(c) rightful intention.

Three further conditions which ought to apply are

(d) war must be a proportionate response;

(e) there must be reasonable prospect of success; and

(f) war must be the last resort.

The constraints are each necessary and collectively sufficient to permit resort to war. Note that if all the conditions are met, there is not an obligation to wage war.

The second component of Just War theory, *jus in bello*, addresses the permissibility of actions within the theatre of war. The idea here is that when a party is fighting a war, there are still limits on the range of violent actions they can justifiably perform. Harmful actions in war can be justifiable if:

(g) they are necessary;

(h) they are proportionate;

(i) they do not violate principle of discrimination, which says that civilians are not permissible targets.

The Just War tradition usually takes considerations of *jus ad bellum* and *jus in bello* to be logically independent. The actions of combatants of two parties at war are judged by the *jus in bello* constraints regardless of who is at fault for starting the war. The rules of conduct in war apply equally to both sides, stipulating equality of combatants on the battlefield. Some of the dilemmas of war occur when *jus ad bellum* and *jus in bello* conflict, such as when a party fighting a just war (according to *jus ad bellum* requirements) will lose unless they take actions not permitted according to *jus in bello* constraints.

I note here that recent theorists in the Just War tradition have added an 'end-phase' doctrine, *jus post bellum*.[1] Further, Mollendorf[2] has argued for an additional 'mid-phase' doctrine concerned with whether a war, once underway, ought to be terminated or continued, and how; he calls this *jus ex bellum*.

[1] G. J. Bass, "Jus post bellum," *Philosophy and Public Affairs* 32 (2004): 384-412.
[2] D. Mollendorf, "Jus ex Bello," *The Journal of Political Philosophy* 16(2) (2008): 123-136.

APPENDIX 2

Jus Cogens, The Martens Clause, and the Grounds of Laws of Conduct in War.

In this appendix I present a case study of consensus regarding the prohibitions on violations of certain rights, and argue that these rights are the core value of my rule-consequentialist account of rules governing conduct in war. I will first analyse the concept of *jus cogens*. describing how those rules function in international law, and list some prohibitions that are accepted as peremptory norms. Then I will argue that prohibitions on genocide and torture, for example, are rightfully considered universally legally binding because genocide and torture violate elementary considerations of humanity, and prohibitions on violations of elementary considerations of humanity are universally legally binding. Finally I will argue that the legal prohibitions of acts that are violations of elementary considerations of humanity can justifiably be considered universally legally binding because of a convergence on the underpinning moral concerns and hence overlapping consensus on the laws derived from them.

I should signpost that this is not intended as a comprehensive survey of the *jus cogens* debate. Rather, I intend to indicate the plausibility of a concern for minimising[3] certain rights violations being the moral grounds for universally binding laws of conduct in war.

The Concept of Jus Cogens.

From a moral point of view, some norms in international law ought to be

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[3] Or satisficing or good enough consequences with respect to...

universally binding and non-derogable. For example, the fact that state S has not entered into any treaty prohibiting targeting of civilians ought not to make it legally permissible for S's armed forces intentionally to target civilians. Nor ought it to be legally permissible for two states to enter into a bilateral treaty allowing, for example, a slave trade to operate between them.

The concept of norms that have these characteristics does exist in international law; they are rules of *jus cogens*. Examples of norms that function in this morally desirable way are prohibitions on slavery and limitations on means and methods in armed conflict. Since the universally binding character of prohibitions will inevitably have to be asserted in order to justify contested actions (such as trials at international courts, or interference with state sovereignty) we need a good explanation of why they are universally binding and non-derogable. These explanations could appeal to natural law[4] or be grounded in positive law.[5]

The concept of *jus cogens* is often characterised by the idea that in international law there is a 'hierarchy' of rules, and at the 'highest' level are laws that are universally binding; these are termed peremptory norms.[6] While the existence of certain norms of international law that function in that way is uncontentious and there is some agreement among authors regarding the content of those norms,

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[4] An appeal to, for example, the existence of 'higher' legal values that cannot be altered by the agreement of states.

[5] For example, a claim that for the existence of any international legal order, it is necessary that certain principles of international (positive) law function as universally binding and non-derogable norms – rules of JC. Since there does exist an international legal order, some norms have a universally binding and non-derogable character.

[6] Not all authors agree on this characterisation. Schmahl points out that the relationship between derogable and non-derogable norms does not require a hierarchy; it does not require the latter to have a 'higher ranking' than the former. S. Schmahl, "An Example of Jus Cogens: The Status of Prisoners of War," in *The Fundamental Rules of the International Legal Order;* Jus Cogens *and Obligations* Erga Omnes, ed. C. Tomuschat, and J.M. Thouvenin (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 45.

there is less agreement on why they ought to be universally binding, and on the source of rules of *jus cogens*.

One aspect of rules of *jus cogens (JC)* is that they 'trump' any treaties with which they conflict; or more precisely, any treaties that conflict with a peremptory norm are void and the peremptory norm applies instead. Thus rules of JC are laws from which there is no derogation. This can work in two ways. First, a treaty is void if it conflicts with an existing peremptory norm.[7] Second, if a new peremptory norm emerges, any existing treaties that conflict with it become void.[8]

We can contrast JC with *jus dispositivum*, which refers to those elements of international law that states can choose to denounce. States can enter into valid treaties releasing them from duties arising from rules of *jus dispositivum*, creating alternative sets of rights and duties. For example, international laws govern relations between states and foreign diplomats within their territory. But two states could choose to enter into a bilateral treaty creating some new set of rules governing treatment of each others' diplomats. Thus the international laws governing treatment of diplomats are *jus dispositivum*.

A second aspect of JC is that while the content of some peremptory norms can be found in treaty rules, they are thought to apply universally regardless of whether states have entered into any treaties binding them to the norm. For example, the International Court of Justice considers that the provisions of the Genocide Convention apply to and are binding on all states regardless of whether they have

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[7] Article 50 of 'Draft Articles on the Law of Treaties', cited in E. Schwelb, "Some Aspects of International Jus Cogens as Formulated by the International Law Commission," *The American Journal of International Law* 61(4) (1967): 946.
[8] Article 61 of Draft Articles on the Law of Treaties, cited in ibid. p 946.

formal conventional obligations.[9] So the law against genocide has the character of JC. Following from this universality is that recognition of a rule as JC arguably prohibits states from making treaty reservation to those rules[10] (or at least, the JC rule remains binding, and the reservation does not take effect in law). Schwelb claims that 'the most important provisions of the [UN] Charter are now considered to be peremptory norms of general international law, binding on Members and non-Members alike'.[11] Thus they have the character of JC.

However, it would be a mistake to conclude that the content of JC is only found in treaty laws; elements of customary international law can be considered peremptory norms and so be rules of JC. Rules of customary international law are derived from general practice, case law, and found in documents such as military manuals.[12] Those principles which are accepted as international law are binding, which in practice is realised by the international courts applying and enforcing principles of general practice as law. For example, there is no treaty law prohibiting attacks on civilian infrastructure in non-international war, but such a prohibition has emerged in customary international law.[13] Those norms of customary law that apply to all parties, and that 'trump' other norms of either treaty or customary law, have the character of JC. While the content of peremptory norms can be found in treaty or customary law, some authors claim that the principle of peremptory law or JC is rooted in customary law.[14]

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[9] Schwelb, p 955

[10] S. Kadelbach, "*Jus Cogens*, Obligations *Erga Omnes* and other Rules – The Identification of Fundamental Norms." In *The Fundamental Rules of the International Legal Order;* Jus Cogens *and Obligations* Erga Omnes, ed. C. Tomuschat, and J.M. Thouvenin (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 26.

[11] Schwelb op. cit. p 960

[12] See also the standard definition of customary international law contained in Art 38 (1)(b) of the Statute of the ICJ. http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[13] ICRC, 'Customary International Humanitarian Law: Questions & Answers', from http://www.icrc.org, p4 (retrieved 29/5/07).

[14] Kadelbach,op. cit. p 34.

The Vienna Convention on the Law of Treaties has a definition of those norms elevated to the level of JC:

> A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. (Article 53)[15]

This raises some questions. For example, we need some explanation of what this recognition and acceptance consist in, and whether 'as a whole' require unanimity. If the latter were the case then any state can claim that they neither recognise nor accept norm N as peremptory norm, therefore it is not one; therefore N is not universally binding, and specifically N does not apply to them. This would render the concept hollow – a 'universally binding' norm from which any state can opt out. If 'as a whole' does not require unanimity, then there needs to be further explanation of what proportion of states is sufficient, and why.

The Vienna Convention defines JC by describing the effect of being characterised so, but does not give a substantive definition of the content of JC - a definition of the subject matter which makes up the content of peremptory norms.[16] The International Law Commission (ILC) were also aware that a list of examples might lead to misunderstanding regarding other possible cases,[17] as the list would necessarily be incomplete. However, the commentary did include a non-exhaustive indicative list, and the legal literature reveals that examples of rules considered to have the status of JC are prohibitions on aggression, genocide, war crimes, piracy, slavery and torture;[18] so at least some *jus ad bellum* and *jus in*

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[15] "Vienna Convention on the Law of Treaties 1969," http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

[16] W. Czaplinski, "Jus Cogens and the Law of Treaties," in *The Fundamental Rules of the International Legal Order;* Jus Cogens *and Obligations* Erga Omnes, ed. C. Tomuschat, and J.M. Thouvenin (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 87.

[17] A. Verdross, "Jus Dispositivum and Jus Cogens in International Law," *The American Journal of International Law* 60(1) (1966): 57.

[18] M.C. Bassiouni, "International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes'," *Law and Contemporary Problems* 59(4) (1996): 68.

bello constraints are considered to have JC status. Also included are apartheid,[19] murder/disappearances and prolonged arbitrary detention.[20]

The Martens Clause.

In addition to these JC laws, a prohibition on violations of elementary considerations of humanity functions as a rule of JC. States can denounce their treaty obligations under the Geneva Conventions; however, this does not release states from all obligations in armed conflict. In Geneva Convention 1 Article 63 we find that such a denunciation:

> ... shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience.[21]

These provisions derive from the Martens Clause, various formulations of which have appeared in international agreements since its first appearance in the Preamble to the Hague Conventions on the Laws and Customs of War on Land 1899,

> 'Until a more complete code of the laws is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of public conscience.'[22]

According to Schwelb this refers to prohibitions that have the character of peremptory norms; they function as JC.[23] This interpretation is supported by the 1977 Protocol 1 Additional to the Geneva Conventions Article 1(2), which states:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law

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[19] M. Byers, "Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules," *Nordic Journal of International Law* 66 (1997): 219.
[20] H. Charlesworth and C Chinkin, "The Gender of Jus Cogens," *Human Rights Quarterly* 15(1) (1993): 68.
[21] A Roberts and R Guelff eds, *Documents on the Laws of War* (Oxford: OUP, 2000), 354.
[22] T. Meron, "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience," *The American Journal of International Law* 94(1) (2000): 78 – 79.
[23] Schwelb, op. cit. p 957.

> derived from established custom, from the principles of humanity and from the dictates of public conscience.[24]

So in international law it is accepted that all parties are bound by these considerations of humanity. It is uncontentious that the Martens clause, or its modern variants, functions as a peremptory norm.

We should note that the Martens clause refers to three principles. The wording of each varies across the different formulations, but from the 1977 version the first is 'principles of international law derived from established custom', the second is 'principles of humanity', and the third is 'dictates of public conscience'. The first of these is sufficient for identifying a customary norm. This rules out a 'cumulative' reading of the three principles – they cannot each be necessary conditions. A better interpretation is to take each principle – established usage, the laws of humanity and the dictates of the public conscience – to operate as independent principles of international law.[25] Each is sufficient but none are necessary conditions for an action to be prohibited in law. This interpretation allows, for new situations such as a new weapon, the emergence of new rules governing conflict grounded in principles of humanity independent of state practice with respect to the new weapon. We should also note that public conscience is not the same as public opinion, which can on occasion be in conflict with principles that are elementary considerations of humanity. I will not address here the question of establishing what the dictates of public conscience require.

Grounding *Jus Cogens* in Elementary Considerations of Humanity.

So there is evidence that the Martens Clause functions as a peremptory norm in international law and so can be understood as part of the content of JC rules.

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[24] Roberts & Guelff, op. cit. p 423.
[25] Meron, op. cit. p 81.

There is also evidence that the 'principles of humanity' referred to in the Martens Clause can be the grounds for other prohibitions taken to be the content of JC – in particular, laws of war. The report on the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) states:

> In this context [of crimes against humanity], it is to be noted that the International Court of Justice has recognised that the prohibitions contained in common article 3 of the 1949 Geneva Conventions are based on 'elementary considerations of humanity' and cannot be breached in an armed conflict, regardless of whether it is international or internal in character.[26]

Support for the idea that international law actually does treat the elementary considerations of humanity as the source of other rules that function as JC, can be found in a further statement by the ICTY:

> the prohibition against attacking the civilian population as such, as well as individual civilians, and the general principle limiting the means and methods of warfare... emanate from the elementary considerations of humanity [which 'also derive from the Martens clause'] which constitute the foundation of the entire body of international humanitarian law applicable to all armed conflicts.[27]

and from the Law Reports of Trials of War Criminals:

> the governing effect of that sovereign clause which does... really in a few words state the whole animating and motivating principle of the law of war, and indeed of all law, because the object of all law is to secure as far as possible in the mutual relations of the human beings concerned the rule of law and of justice and of humanity.[28]

So 'elementary considerations of humanity' serve as the grounds of prohibitions that ought to be universally binding and non-derogable; laws that function as

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[26] Ibid. p 82.
[27] Ibid. p 82.
[28] Ibid. p 80.

peremptory norms. The documents I have cited do not specify what these basic principles or elementary considerations of humanity are, but a plausible interpretation is an obligation not to treat persons (or other humans) in certain ways, not to do certain things to them – or a right that they are not treated that way.

This link between elementary considerations of humanity (ECH) and certain rights could be that (i) it is an ECH that persons have certain rights; or (ii) certain rights are ECHs. Alternatively, (iii) prohibitions on certain rights violations are ECHs; or (iv) the violation of certain rights is contrary to ECHs. Since my argument is concerned with claims (rights) that persons refrain from doing X, Y and Z and corresponding duties not to X, Y or Z, and not with the more general claim that persons possess certain basic human rights, (iv), and possibly (iii) more closely capture the relationship. However, while the sense of each interpretation is different, I do not think that my arguments will turn on arguing for one in preference to the others; and each can be understood to refer to the same rights and duties.

The acceptance of the Martens Clause shows that a norm prohibiting violations of elementary considerations of humanity is the focus of convergence from adherents of diverse normative views. I will not attempt to support with any further argument the reasons for holding these elementary considerations of humanity as moral principles, but leave it to adherents of different traditions to give reasons from within their own tradition. Consequentialist, deontological and virtue theories could all agree that persons ought not to cause unjustified harm to others, and that this norm is universally binding. More broadly, an autonomous presentation of such a prohibition such as is given here could gain support from a range of religious or

philosophical traditions, and thus yield an overlapping consensus on the content of laws deriving from these principles (including laws of war). Of course, how to interpret the Martens clause - what constitutes harm or violations of basic human rights - is going to be disputed, and agreement on new cases such as 'waterboarding' will be the subject of debate which will probably be neither easily nor automatically settled.

In conclusion, rules that are rightly considered peremptory norms are universally binding because they prohibit acts that would violate elementary considerations of humanity, and prohibitions on acts that would violate elementary considerations of humanity can be taken to be universally binding because of this overlapping consensus.